REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

Courts of Exchequer

AND

Exchequer Chamber.

WITH TABLES OF THE NAMES OF THE CASES
AND THE PRINCIPAL MATTERS.

By ROBERT PHILIP TYRWHITT, Esq.
BARRISTER AT LAW, OF THE MIDDLE TEMPLE.

"Ejus (*Analogiæ*) hæc vis est, ut id quod dubium est ad aliquid simile de quo non quæritur, referat; ut incerta certis probet."
Quinct. Inst. Orat. lib. i. c. 6.

VOL. V.

FROM MICHAELMAS TERM, 5 WILLIAM IV. 1834, TO
TRINITY TERM, 5 WILLIAM IV. 1835;
BOTH INCLUSIVE.

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AND
J. & W. T. CLARKE, PORTUGAL STREET.

1837.

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JUDGES

OF THE

COURT OF EXCHEQUER OF PLEAS,

From Michaelmas Term 1834 *to Trinity Term* 1835, *both inclusive.*

The Right Hon. JOHN SINGLETON, Lord LYNDHURST, C.B.

The Hon. Sir JOHN BAYLEY, Knt.
The Hon. Sir JOHN VAUGHAN, Knt.
The Hon. Sir JAMES PARKE, Knt.
The Hon. Sir WILLIAM BOLLAND, Knt.
The Hon. Sir EDWARD HALL ALDERSON, Knt.
The Hon. Sir JOHN GURNEY, Knt.
The Hon. Sir JOHN WILLIAMS, Knt.

ATTORNIES-GENERAL.

Sir WILLIAM HORNE, Knt.
Sir JOHN CAMPBELL, Knt.

SOLICITORS-GENERAL.

Sir JOHN CAMPBELL, Knt.
Sir CHARLES CHRISTOPHER PEPYS, Knt.

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ERRATA.

Page 535, in fifth *long* line of marginal note, *for* " either" *read* " the."

Page 551, line six of marginal note, after " defendant" *add* " in trover."

ARGUED AND DETERMINED IN THE

COURTS OF EXCHEQUER OF PLEAS

AND

EXCHEQUER CHAMBER,

IN

Michaelmas Term,

IN THE FIFTH YEAR OF THE REIGN OF WILLIAM IV.

TALBOT *against* LEWIS.

1834.

In trespass brought by the lord of a manor for carrying away dollars claimed by him as wreck, two instruments dated in 1639 and 1657, and purporting to be present-

TRESPASS for breaking and entering a close of the plaintiff called *Rossilly Sands*, in the county of *Glamorgan*, digging up and subverting the soil, and raising therefrom 5000 pieces of silver called *Spanish* dollars, and carrying away and converting them to defendant's use. Pleas: first, as to entering the close and subverting &c., that the close in which &c. was not the close of the plaintiff; and secondly, as to the raising and converting the pieces of silver, that they

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shire assizes, it appeared that the plaintiff was lord of the manor of *Llandymore* in the peninsula of *Gower* in that county, which his ancestors had acquired from one of the Earls of *Pembroke*, subject to a fee farm rent payable to the Duke of *Beaufort*, as lord of the paramount seignory or honor of *Gower*. The *Rossilly* sands extend two miles along the coast of *Gower*, and about a century ago a *Spanish* ship was wrecked on them, near the spot on which the trespasses were committed. To prove that *Llandymore* was a manor, it was shown that courts had been held and chief rents received in right of that manor for a long series of years. Payments were also proved to have been made to the lords for liberty to put up fishing nets within the manor at or near low water, and for trespasses in going backward and forward to wrecked ships, though the passage to them was not on the inclosed lands, but on the beach, above high-water mark. The lords were also shown to have taken possession of wrecks thrown on the *Rossilly* sands, keeping them the year and day, and appropriating them afterwards, if unclaimed. Among the latter instances it was shown that about 27 years before, the plaintiff's father dug at the spot in question, between high and low water mark at about four hours ebb, and obtained dollars there. In order to establish a right by prescription to wreck cast on the *Rossilly* sands, as well as to show them to be within the boundaries of the manor of *Llandymore*, the following presentments were produced from the rolls of the manor.

"Maneriu' de *Llandymôr*

The Survey of the mannor aforesaid, taken the 24th daie of *August*, anno regni Dni. nori, *Caroli* Dei gratia *Anglie* &c. Regis fidei defensoris &c.

decimo quarto, 1639, by the Worshipful *William Herbert*, mayor of *Cardiff*, (and three others) surveyors for the R. Hon. *Phillip* Earl of *Pembroke* and *Mongomerie*, Lord of the said manor."

Then followed the names of fifteen jurors, of whom eight appeared by the survey to be tenants of the manor. To the first article they say: "Ther is another parcel of the aforesaid lordship, called *Rossily*, whose mears and bounds wee find to begin at &c. and so compassinge the same eastward to the sea shore, and thence northward to the fall of a lake or brook called *D.* into the sea."

To the fifteenth article the jurors say, "that all manner of waifes, strayes, felons goods, treasure trove, wreck, deodants and such like royaltyes, are and tym out of mynd have byn due to the lord of this manor, and that the baylif was wont to take notice thereof, and that *Jonathan Mayne* is now in that office, and hath answered the lord or his receiver of the same, as we think and know not to the contrary."

The presentment put in secondly, was entitled as follows:

"Manerium de *Landimore*.

A Survey of the said manor taken 28th *September* 1657, nono ann. Dom. before *W. S.* and *G. L.* Commissioners of the said survey for the Right Hon. *Phillipp* Earl of *Pembroke* and *Montgomery* &c. and lord of the said manor."

Then followed the names of seventeen jurors, of

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whom seven appeared from the survey to be tenants of the manor.

To the first article they say, "*Rossilly*. Also [finding the same boundaries as the jury in 1639,] there is another pcell of the aforesaid lordship of *Landimore*, called *Rossilley* in the parish of *Rossilley*, whose meares and bounds have bin tyme out of mynd, as followeth, beginninge att a well called &c., and soe westward by the sea side to the point of *Wormshead* beinge within this lordship, and soe northward by the sea side to the fall of *D*.

"To the nienth article we say, that all wayfes, estrayes, wreck of sea, and fealons goods, treasures trove, or such like within the precincts of this manor, doth belonge to the lord of this manor, and how the lord hath heretofore ben answered thereon we know nott."

Another presentment made 12th *July* 1798, after similar survey, contained the answer of the jurors as follows.

"Also that all waifs, estrays, and felons goods, wrecks of the sea, treasure trove, and all other royalties within the said manor, belong to the lord and to no other person or persons whomsoever."

E. V. Williams objected, that the presentments were not evidence of the plaintiff's right to wreck on the locus in quo; for wreck is the subject of a grant from the crown, and not a matter to be proved by reputation. He also urged, that the dollars were not shown to be other than treasure trove (*a*), which was not shown to be granted to the plaintiff. Also, that the boundaries of the manor were not shown to extend further than high-water mark, being only "to the sea shore." *Parke* B. admitted the presentments as evi-

(a) See 2 Inst. 20, 577.

dence of the boundaries of the manor, but rejected them as proof of the right to wreck, that being a royal franchise, as to which the jurors could have no particular means of knowledge as inhabitants of the particular district. He said, that in absence of proof of any inroad of the sea, the dollars must be taken to be wreck. The defendants gave no evidence. The trespasses having been proved, the learned baron told the jury, that the plaintiff claimed the sea shore as lord of the manor, and also a right to wreck as grantee from the crown (*a*). That though the crown had in many instances granted away the soil, between high and lower water mark (*b*), the grant could seldom be produced, and was generally proved by acts of ownership. That the plaintiff being clearly lord and entitled to the waste, lawful possession of the locus in quo was sufficiently shown by proof of the acts of ownership given in evidence, some of which were the strongest such a place was capable of. That while proof of his occupation had been given, no proof of any other appeared. That the boundary of the manor might be as far as high or low water mark, the words "to the sea shore" being ambiguous. That as to the wreck, the plaintiff's possession was sufficient, as against wrong-doers not acting under authority of the crown. That the question was, whether from the evidence of user, the jury thought the plaintiff entitled

(*a*) In Year Book 5 *Edw.* 3. 3 *a.* cited *Constable's* case, 5 Rep. 107 *a*, the defendant prescribed to have *wreck within his manor of W.*; on which Lord *Coke* observes, that "forasmuch as a ship cannot be wreck, *sc.* cast on the land, but between the high water and low water mark, thence it follows that that was parcel of the manor."

(*b*) The shore between high and low water mark may and commonly is parcel of the manor adjacent, and so may belong to a subject; yet primâ facie it is the king's; Per *Hale* C. J. Hargrave's Law Tracts, 12; Vin. Ab. tit. *Prerogative*, (B. a.) pl. 12; Ex *parte Lord Gwydir*, 4 Madd. R. 321.

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to the wreck, for if they did, the plaintiff had a qualified property in it, which would entitle him to support an action. Verdict for the defendant.

J. Wilson moved for a new trial. First, the presentments were admissible as evidence of the plaintiff's right to wreck; and secondly, the verdict was against the evidence on the first point. The right to wreck cast on a given spot of the sea shore is of a public nature, proveable by testimony of general reputation. Then the declarations of parties enjoying opportunities of knowledge from the vicinity of their residences to the shore or manor must be admissible. The jurors must have known to whom, after the year and day, the wreck was delivered. [*Parke* B. They were no more interested in the title to the property wrecked, than any indifferent person.] They had means of knowledge without interest to misrepresent. It appears from *Constable's* case (*a*), that a party claiming wreck against the king, may have a commission to hear and determine the truth of it by a jury, and if against other than the king, he may have the commission, or bring his action at the common law, and prove it by verdict of a jury. Stat. 3 *Edw.* 1. (*West.* 1.) c. 4. enacts, that wrecked goods shall be saved and kept by view of the sheriff, and by view "of such as are of the town" where the goods were found; so that if any sue for them, and after can prove that they were his, or perished in his keeping within a year and a day, they shall be restored to him without delay." This shows that though the franchise of wreck be in the crown or its grantee, the residents of the township were made a kind of jury of salvors for preserving the wreck for a year and a day, till it should appear whether it was such wreck as

(*a*) 5 Rep. 106 *a*.

would belong to the crown or its grantee; so that they must be taken to have known the ultimate disposition of the articles. Some of the persons answering seem to have inhabited the locus in quo, and are called jurors, and were questioned on account of local knowledge. He then urged, that the verdict was against evidence.

Lord LYNDHURST C. B.—The plaintiff here claimed wreck as lord of the manor. He might have a right to it either by grant or by prescription, which supposes a grant; but the right is in both cases private, belonging to the manor. Then the tenants of the manor have no more concern with it than any other of its inhabitants, and cannot be presumed to be better acquainted with it than any other of the king's subjects. I am therefore of opinion that the answer of the jurors made by way of presentment was not admissible in evidence to prove the right to wreck. But we will grant a rule on the other point.

PARKE B.—The strength of the defendant's case consisted in the absence of any evidence on the part of the plaintiff. I rejected the presentment, because as the right to wreck could not have been in either the tenants of the manor, or the inhabitants of the town, their declarations could not be an exception to the general rule against admitting hearsay evidence.

ALDERSON B.—The evidence was rightly rejected Primâ facie the right to wreck of the sea is in the crown; it may also be in the lord of the manor by grant or prescription, which implies a grant. Then can such evidence as this be sufficient to dispossess the crown of this right? Besides, the tenants of the manor on whose declarations it was sought to support

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the lord's right, could not possess more knowledge on the subject than any other parties.

Rule granted only as for a verdict against evidence.

Cause having been shown in *Hilary* term 1835, the *Court* said, that though, had the action been in trover for wreck, the plaintiff's evidence would not have been so cogent as to entitle him to a new trial on a verdict against him, still as his ownership of the soil of the sea shore was in issue on the first plea, they would, on that plea, grant a new trial (*a*).

See *Weeks* v. *Sparke*, 1 M. & S. 687; *Richards* v. *Bassett*, 10 B. & Cr. 657.

(*a*) The lord of a manor cannot establish a claim to the exclusive right of cutting seaweed on rocks situate below low-water mark, except by a grant from the king, or by such long and undisturbed enjoyment of it as to give him a title by prescription. The sea is the property of the king, and so is the land beneath, except such part as is capable of being occupied without prejudice to navigation, and of which a subject has either a grant from the king, or has exclusively used for so long a time as to confer on him a title by prescription. *Benest* v. *Pipon*, on an appeal from *Jersey*, 1 Knapp's Privy Council Reports, 68. A. D. 1829.

INGLIS and Another, assignees of THOMAS JAMES SPENCE, *against* GEORGE SPENCE.

In an action by assignees of a bankrupt for goods sold and delivered by the bankrupt before his bankruptcy, the plea denied their title as assignees, and a notice to dispute the trading &c. was given, pursuant to 6 *G.* 4. c. 16. sect. 90. Letters from the defendant to one of the assignees, and to the solicitor to the commission, deprecating proceedings against him, are primâ facie evidence in admission of the plaintiff's title to sue as assignees, without the regular proof of the bankruptcy.

ASSUMPSIT by assignees of a bankrupt for goods sold and delivered to the defendant by the bankrupt before his bankruptcy. Plea, that the plaintiffs

are not assignees of the estate and effects of *T. J. Spence*, and that *T. J. Spence* is not a bankrupt. Notice to dispute the trading, act of bankruptcy, and petitioning creditor's debt. At the trial before *Gurney* B. at the last *Lancashire* assizes, two letters from the defendant were given in evidence by the plaintiffs to show his admission of their title as assignees, and to dispense with the necessity to prove the bankruptcy in the usual way; *Dickinson* v. *Coward* (a), and *Pope* v. *Monk* (b). The first was addressed to the solicitors to the commission as follows:

"Gentlemen, *Manchester*, 7th *March* 1834.

"I have received your letter of the 4th instant, the contents of which surprise me a good deal; for from the conversation I had with Mr. *W.* and Mr. *I.* in Mr. *S.*'s office, it was fully understood from what I then stated, that that debt was not to be called for until I was able to make some arrangement for payment. I have seen Mr. *W.* to-day, and he says he has never heard it spoken about since that time. I am beginning a new business, which will take a long time to do any good with. I am also waiting in weekly expectation of my old concern being brought to a close, having long had the recommendation of the trustee and commissioners to my discharge; but until this is accomplished I cannot enter into any new arrangement, and if your instructions from the assignee are to take steps against me, you must do it. That debt was more in amount before I left *Dumferline* than it is now, and would have been nearly liquidated by this time had I been in employment. As formerly stated, I will take the debt upon me, but I will not engage that the interest shall accumulate; and if the assignees of

(a) 1 B. & Ald. 677. (b) 2 C. & P. 112.

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T. J. Spence's estate do not feel inclined to give me that promise, I must apply to another to take a step that will relieve me of it; for I cannot pretend to go on in business, and even attempt the principal, if I am to be harassed in this way. I will require an early reply to this letter for my guidance in business, which, if persevered in, will take me a good deal from home. I see a letter to my son *A. G. Spence;* he is in *Liverpool*; his account has all along been reckoned as finally bad, and any step against him will only add expense, make him lose his situation, and be at the expense of the insolvent act. I have not forwarded his letter, to save postage, as I know what I have stated is all he can say upon the subject.

"I am, &c." (Signed by defendant.)

The other letter addressed to the plaintiffs contained the following passage:

"I have stated my willingness to pay the claim as soon as I could realise any funds to do so with; but if you persist in prosecuting me now, I will be compelled to take the benefit of the insolvent debtors' act, having no other alternative left; and thus you will squander part of the funds in a fruitless law suit, and blast the prospects I have entertained from the business I am endeavouring to establish, with a view to enable me to supply my family and liquidate my debts. What I have now stated are facts, so that should you proceed further in your action, in the end you cannot say you have done so in ignorance. I submit to you the propriety of fulfilling that part of the duty of assignees to protect alike both parties; and in conclusion, I have only once more to state that prosecuting me at present must diminish the funds of my son's estate, and thus

injure his creditors; and is also a species of oppression to him as well as the rest of my family and myself."

(Signed by defendant.)

The plaintiff had a verdict by direction of the learned baron, who, after hearing an objection for the defendant, held the bankruptcy sufficiently proved.

Atcherley Serjt. now moved for a new trial. The defendant's letters were not of themselves sufficient evidence of that title of the plaintiffs as assignees which was distinctly put in issue on the record. The distinction between conclusive and primâ facie evidence does not here apply; for on this issue, and after the notice to dispute, pursuant to 6 *Geo.* 4. c. 16. s. 90., an admission of bankruptcy does not sufficiently establish title in the assignees without proving it in the regular way. In *Dickinson* v. *Coward*, the circumstance that the defendant being indebted to the bankrupt for goods bought, attended the commissioners and exhibited an account between him and the bankrupt, claiming certain deductions, and afterwards made a part payment to the assignee, was held by Lord *Ellenborough* to be clear though not conclusive evidence of the defendant's recognition of the plaintiffs' character of assignee. But *Abbott* J. said, "If the defendant had doubted whether he bore that character, it was competent for him to put that fact in issue *by giving the requisite notice;* and not having done so, it must be taken as against him that he made the payment to and treated with the plaintiff in that character in which he has sued, viz. as assignee of the bankrupt." In *Pope* v. *Monk* it does not appear that such notice was given. Were this evidence sufficient to prove the plaintiffs' title as assignees, parties being creditors of or debtors to the bankrupt might be called before persons acting as his

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assignees, and might deal with and make payments to them accordingly, without means of knowing their title so to act, and be estopped from disputing that title afterwards. If it is only primâ facie evidence, how can it be rebutted? Then the burden of proof lies on the assignees, who being conusant of their own title have pleaded it, and have received notice that they will be required to prove it regularly. [Lord *Lyndhurst* C. B. The question is, whether this is evidence, not whether it is conclusive. *Alderson* B. He might admit owing a debt, but might express his doubts whether the assignees were or were not really such. *Parke* B. It was an argument for the jury that this evidence did not conclusively admit title in the assignees, but was only made to buy peace.] *Rankin* v. *Horner* (*a*) was trover by the assignees of a bankrupt against the sheriff and an execution creditor. Notice of disputing the petitioning creditor's debt had been given under 49 *Geo.* 3. c. 121., and it was held that evidence of the execution creditor having proved his debt under the commission, was not evidence of the petitioning creditor's debt, either against the former or the sheriff. Lord *Ellenborough* says, "The creditors have not the means of knowing what was the evidence on which the party was declared a bankrupt; they had no right to be present when that evidence was given; they have no right to look at the proceedings under the commission in order to see what that evidence was; and is it reasonable that they should be put to the dilemma of being barred by a certificate, or of being taken to have admitted that every act necessary to support the commission really existed, when they had not the means of judging whether such acts existed or not, and of having such their supposed admission received as evidence against them in every

(*a*) 16 East, 191.

case in which the question could arise." [Lord *Lyndhurst* C.B. That case has little application to the present. However what was said by Lord *Ellenborough* was precisely on the point now before us. *Parke* B. The admission there made by a party proving a debt due to him from the bankrupt before commissioners, is quite different from the present, which was made by a debtor to the bankrupt.]

Lord LYNDHURST C. B.—The admissions on the defendant's letters afforded sufficient primâ facie evidence of the plaintiffs' title as assignees. Then as the jury have decided on its value by finding that they did recognise the plaintiffs as filling the character in which they sue, it cannot now be said that no such admission is conveyed by those letters. Suppose the defendant had expressly admitted the plaintiffs' title as assignees, would not that admission be evidence? No hardship can arise unless the party who makes a payment makes it absolutely, without reserving the question of title. What Lord *Ellenborough* said in *Dickinson* v. *Coward* is decisive on the point: "It certainly is not conclusive evidence, and it was competent for the defendant to show that the plaintiff bore any other character; but I take it to be quite clear that any recognition of a person standing in a given relation to others, is primâ facie evidence against the person making such recognition that that relation exists." (*a*)

(*a*) In *Ledbetter*, assignee of *Hollis*, v. *Salt*, 4 Bing. 623, it was held that an affidavit that a party is indebted to deponent in 100*l*. and upwards, and is become bankrupt, is as against deponent conclusive evidence of the bankruptcy. A general admission by a bankrupt of a debt due to the executors of a given person will not, in an indictment against him for secreting his effects, supply a defect of proof that they all assented to act in discharge of the trust to carry on the testator's business; *Rex* v. *Barnes*, 1 Stark. C. N. P. 243. In *Clarke* v. *Clarke*, 6 Esp. 61, *Heath* J. held, that where a party

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PARKE B.—Suppose that the defendant, before action brought, had circumstantially admitted the petitioning creditor's debt, and every other fact which it was necessary for the plaintiff to prove, evidence of that admission must have been let in. Now the jury by their verdict have given the effect of such an admission to the declarations of the defendant contained in the letters produced; nor does it make any difference as to the admissibility of the evidence, whether it is offered on the general issue in proof of an averment in the declaration as formerly, or on a special traverse of the plaintiffs' title, as in this case; nor does the notice make any difference in respect of the nature of the evidence or the medium of proof, which may be by admissions in this as well as in other cases. The only effect of 6 *Geo.* 4. c. 16. s. 90. and 92. is, that if the notice of disputing the bankruptcy provided by the first of those sections is not given, no evidence dehors the depositions need be produced. It was a topic to be urged to the jury that these letters were not an admission of bankruptcy, but were merely written to buy peace.

against whom a commission of bankrupt issued, sanctioned the sale of his own effects under it, he could not afterwards treat it as a conversion. In *Like* v. *Howe*, 6 Esp. 20. the bankrupt was precluded from contesting the title of persons to be assignees whom he by his conduct had procured to become so. See these two last cases cited by *Bayley* J. in *Heane* v. *Rogers*, 9 B. & Cr. 588. In *Heane* v. *Rogers* the bankrupt's acts in assisting the assignees by giving directions as to the sale of his goods, and giving notice to his lessors that he had become bankrupt, and resigning his farm accordingly to them, were held not to amount to a consent by him to the sale, or to estop him from disputing his bankruptcy. In *Watson* v. *Wace*, 5 B. & Cr. 153, it was held that the bankrupt could not dispute the validity of the commission after he had obtained his discharge out of custody by reason of it. And see *Goldie* v. *Gunston*, 1 Campb. 381, per Lord *Ellenborough*, *Mott* v. *Mills*, 3 C. & P. 197; *Pope* v. *Monk*, 2 C. & P. 112; *Davis* v. *Burton*, 4 id. 166.

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ALDERSON B.—I agree. What is said by Lord *Ellenborough* in *Rankin* v. *Horner* relates to the inference which ought fairly to be drawn by a jury from such admissions. In *Dickinson* v. *Coward* it was argued that the defendant had treated with and made a payment to the plaintiff as representative of the bankrupt, and that as he was not shown to represent him in any other character, it must be presumed that he represented him in the character of assignee, and what *Abbott* C. J. said cannot be taken otherwise.

GURNEY B.—In *Dickinson* v. *Coward* it was in doubt whether the party had paid money to the plaintiff as assignee or other representative of the bankrupt; whereas here no such doubt was raised.

Rule refused.

GILES *against* SMITH.

In trover by a bankrupt against his assignees to try the validity of the commission: Held, that secondary evidence of the assignment might be given after proving that it was lost before it was entered of record as directed by 6 *Geo.* 4. c. 16. s. 96., and 2 & 3 *Will.* 4. c. 114. s. 7. *Semble*, proof of the plaintiff's acquiescence in the defendant's acts as assignee, and dealing with him in that character would render proof of the assignment unnecessary.

TROVER. The action was brought to try the validity of a commission of bankrupt issued against the plaintiff under 6 *Geo.* 4. c. 16., under which the defendant had been appointed assignee. At the trial before *Parke* B. at the *Middlesex* sittings after *Trinity* term, the defendant produced all the proceedings in bankruptcy, except the commission and the assignment. The contents of both were shown, and they were proved to have been lost during a hearing in the court of review. A clerk from the inrolment office proved that the lost assignment had not been recorded by the defendant pursuant to 6 *Geo.* 4. c. 16. s. 96 (*a*)

(*a*) 6 *Geo.* 4. c. 16. s. 96. enacts, "that in all commissions issued after this act shall have taken effect, *no* commission of bankruptcy or adjudica-

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but the commission had. The plaintiff offered in evidence a copy of the commission, and a counterpart of the assignment, executed by the defendant only, and not by the commissioners (*a*). It was also proved that a petition by the plaintiff to supersede the commission at the expense of the petitioning creditor, for want of a sufficient petitioning creditor's debt and act of bankruptcy, had been dismissed by the court of review with costs. A receipt signed by the plaintiff for his allowance as a bankrupt, and given by him to the defendant as assignee after the assignment, was also proved, and the defendant was also proved to have acted as assignee. For the plaintiff it was insisted that this evidence did not prove title in the assignee, and that the counterpart being only an authenticated, but not an inrolled copy, was not evidence. The learned baron, however,

tion of bankruptcy by the commissioners, or assignment of the personal estate of the bankrupt, or certificate of conformity, *shall be received as evidence in any court* of law or equity, *unless the same shall have been first so entered of record as aforesaid* [viz. in s. 95.] and the person so appointed to enter matters of record as aforesaid, shall be entitled to receive for such entry of every such commission, adjudication of bankruptcy, assignment, or order for vacating the same respectively, having the certificate of such entry indorsed thereon respectively, the fee of 2s. each, and for the entry of every certificate of conformity, having the like certificate indorsed thereon, 6s.; and every such instrument shall be so entered of record upon the application of, or on behalf of any party interested therein, and on payment of the several fees aforesaid, without any petition in writing presented for that purpose; and the lord chancellor may, upon petition, direct any depositions, proceedings, or other matter relating to commissions of bankruptcy to be entered of record as aforesaid, and also appoint such fee and reward for the labour therein of the person so appointed as aforesaid, as the lord chancellor shall think reasonable, and all persons shall be at liberty to search for any of the matters so entered of record as aforesaid. Provided, that on the production in evidence of any instrument so directed to be entered on the record having the certificate thereon purporting to be signed by the person so appointed to enter the same, or by his deputy, the same shall, without any proof of such signature, be received as evidence of such instrument having been so entered of record as aforesaid."

(*a*) *Roe* v. *Davis*, 7 East, 362.

thought it primâ facie sufficient. Verdict for the defendant, with leave to move to set it aside, and enter a verdict for the plaintiff.

A rule having been granted,

F. Pollock and *Bonsor* showed cause. First, it was not incumbent on this defendant, being an assignee, to prove title in himself under the assignment by producing it. It was sufficient that he had shown the title out of the plaintiff by proving a trading, petitioning creditor's debt, and act of bankruptcy, without showing in whom the property was afterwards vested. It might be otherwise, if he, as plaintiff, was bound to establish a title in himself under a particular assignment. [*Parke* B. Is the bankrupt's title to the property gone before assignment executed?] It is difficult to say it is; yet though it must be presumed after a valid commission proved, that a legal assignment has been made to some one, it is unnecessary, for the purposes of the defence, to show to whom, if the fact of bankruptcy is proved. [*Parke* B. The assignment to any one would be an answer to the action.] Secondly, the assignment was sufficiently proved after the fact of bankruptcy was established. The plaintiff's receipt of an allowance as a bankrupt, at the hands of the defendant as assignee, became evidence as between these parties, that his character as bankrupt was admitted (*a*) by the plaintiff, though it would not show the validity of the commission or estop the defendant from disproving it. As the assignment was actually executed, but lost before it was inrolled, no act could place the assignee in the situation in which he would have been had it been so inrolled, for the

(*a*) As to admissions by bankrupts of their assignees' title, and acquiescence under fiat, see *Heane* v. *Rogers*, 9 B. & Cr. 575; *Goldie* v. *Gunston*, 4 Camp. 381; *Watson* v. *Wace*, 5 B. & C. 153; *Mott* v. *Mills*, 3 C. & P. 197; *Ex parte Davey*, 1 Mont. & A. 297; *Inglis* v. *Spence*, ante.

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property had passed by that deed, and no other could be effectual if inrolled. The proceedings in the court of review for superseding this commission are so many admissions before that court of the defendant's character of assignee. [*Parke* B. The validity of the adjudication was the matter there discussed; the assignment was not in question.] The plaintiff on that occasion did not complain that the defendant was not his assignee, but admitted it; his contention being that he had been improperly adjudicated a bankrupt by the commissioners, and during that discussion the assignment was lost. If it is argued that this case is analogous to that of an agreement lost before it is stamped, in which case other evidence of its contents cannot be admitted (*a*), it may be answered that that rule is adopted to prevent the frauds on the revenue of stamps which would otherwise continually occur. Were the rule otherwise, agreements would rarely be stamped, but after execution and a copy taken the original would be destroyed. Bills, notes, receipts, &c. must be stamped at the time of signature, whereas the assignment under the bankrupt law is effectual as such without a stamp, and at whatever time it is recorded, for it only requires that expense should it be necessary to offer it in evidence. It is true that an agreement may be stamped after execution, but if it be lost before it be stamped, and the parties agree to execute another, and get it stamped, their contract may be enforced; but if an assignment be lost on its way to the inrolment office, no opportunity will be afforded to repair the evil, for as the property would have passed out of the assignor, no fresh assignment could operate. [*Alderson* B. The assignment is valid as such without

(*a*) *Rex* v. *Inhabitants of Castle Morton*, 3 B. & Ald. 588; *Williams* v. *Stoughton*, 2 Stark. C. N. P. 292.

inrolling it of record.] Section 96 directed inrolment in order to make a copy evidence, without a necessity for calling a subscribing witness. [*Alderson* B. The words of the stamp acts, 5 *W.* 3. c. 21. s. 11. and 9 & 10 *W.* 3. c. 25. s. 59(*a*) are, "that no such instrument as those enumerated shall be pleaded or given in evidence in any court, or admitted in any court to be good and useful or available in law or equity, until the duty be paid and the instrument stamped," and are much more cogent than those of 6 *Geo.* 4. c. 16. s. 96. which merely exclude particular instruments from being given in evidence.]

Bompas Serjt. and *Lee* contrà. The defendant could not show the property to have passed out of the bankrupt, except by proving the assignment, and showing it to have been duly inrolled. As the original could not have been admitted in evidence unless inrolled, the copy could not. [*Parke* B. It was argued that if the defendant proved the plaintiff to have dealt with him in his character as assignee, the assignment need not be proved, as the title would be admitted to be out of him. My difficulty is, that I find no evidence of such dealing on my notes, but some inconclusive proof of acquiescence under the commission.] The cases with regard to unstamped instruments are analogous to this. [*Alderson* B. There is this additional distinction between the cases, that it does not appear whether unstamped instruments would, if they remained in existence, be permitted to be stamped on payment of the penalty. See *per Curiam* in *Rippiner* v. *Wright* (*b*).

Cur. adv. vult.

PARKE B. afterwards delivered the judgment of the

(*a*) *See post*, 21, 22.

(*b*) 2 B. & Ald. 478.

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court. This was an action of trover brought by the plaintiff against the defendant, for seizing and selling the plaintiff's goods. The defence was, that a commission of bankrupt duly issued against the plaintiff, and that the defendant was the assignee under that commission. Upon the trial before me at Guildhall the trading of the plaintiff was admitted, and the act of bankruptcy and petitioning creditor's debt proved to the satisfaction of the jury; the commission duly recorded was produced, but the assignment from the commissioners to the assignee was not. It was proved that a sufficient search had been made for this document without success, to let in parol evidence of its contents, (supposing such evidence to be admissible,) and sufficient secondary evidence of the contents was given; but it also appeared that the assignment never was entered of record, pursuant to the statute 6 *G.* 4. c. 16. s. 96.; and it was objected by the learned counsel for the plaintiff that secondary evidence of the assignment was inadmissible. I directed a verdict for the defendant, with liberty to the plaintiff to move to enter a verdict for the value of the goods seized and sold by the defendant, and a rule nisi having been granted early in the term, cause was shown on *Friday* last.

Three points were made on the argument for the defendant:—

First, that the commission and the requisites to support it having been proved, it was unnecessary for the defendant to give any evidence that he or any one else was the assignee, though he must have done so if he had been suing as plaintiff to recover the debts or effects of the bankrupt.

Secondly, that there was primâ facie evidence of the defendant's title as assignee as against the plaintiff, without referring to the proof of the loss of the assign-

ment, and of its contents, which might therefore be rejected altogether.

And, thirdly, it was insisted that if the defendant was obliged to rely on the proof last mentioned, such proof was legally admissible, though the assignment never had been recorded.

We have no doubt but that it was incumbent on the defendant to prove not only that a commission duly issued against the plaintiff, including the trading, petitioning creditor's debt, and act of bankruptcy, but that the property in the goods in question was devested from the bankrupt by an assignment by the commissioners to some person (*a*). We also think, on referring to the notes of the trial and the documents produced, that there was no evidence of the plaintiff's admission of the defendant's character, or that of any one else as assignee, so as to raise the question whether this would supersede the necessity of proving the assignment itself; and therefore the only question for our consideration is, whether the assignment was duly proved?

The objection on the part of the plaintiff is, that the 96th section of stat. 6 *Geo.* 4. c. 16. provides, that no assignment of the personal estate of the bankrupt shall be "received as evidence in any court of law or equity, unless the same shall have been first entered of record," as directed by the 95th section. And it was argued, that unless the assignment had been so recorded, no evidence was admissible to prove it; an objection which would go to the extent of excluding not secondary evidence merely, but any other proof of the title of the assignee, short of some *conclusive* ad-

(*a*) *Turner v. Richardson*, 7 East, 335; *Copeland v. Stephens*, 1 B. & Ald. 593; *Werner v. Barker*, 8 Taunt. 176, per *Burrough* J.; *Webb v. Fox and another*, 7 T. R. 391; also 2 Stra. 978; Peake's N. P. C. 140; 2 M. & S. 446.

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mission of it by the opposite party. In support of this objection, the several decisions on the stamp acts, by which it was held, that if an instrument requiring a stamp had been lost or destroyed before it was stamped, no parol evidence could be given of its contents, were referred to as analogous to the present case. But we are of opinion that there is a material distinction between the clause in question, 6 *G.* 4. c. 16. s. 96., and the provisions of the stamp laws; the first of which is found in stat. 5 *W.* 3. c. 21. s. 11., and is repeated, with some variations not important to the present question, in several subsequent statutes (*a*). That section enacts, "that no record, deed, instrument, or writing shall be pleaded or given in evidence in any court, or admitted *in any court to be good, useful, or available in law or equity*, until the vellum, parchment, or paper on which such deed, instrument, or writing shall be written or made, shall be marked or stamped with a lawful mark or stamp." Under such a provision there could be no doubt that an instrument which was lost or destroyed without being stamped could not be held to be valid or available: for the words of the clause are express and positive, that it should not; and if the instrument, whether of contract or conveyance, was inoperative, parol evidence of its contents was useless. But in the 96th section of the bankrupt act, there are no such words; on the contrary, it is quite clear that the assignment did operate to transfer the property from the bankrupt from the moment of its execution; and there is no expression from which it is possible to collect the intention of the legislature that a default in entering the assignment of the record should deprive it of legal validity; it seems

(*a*) 9 & 10 *W.* 3. c. 26. s. 59. &c. collected 2 Stark. on Ev. 2d edit. 771, n.

absurd to impute such an intention when it is considered that the effect would be to revest the property in the bankrupt; and if it be said, that although the instrument is not by default of inrolment rendered absolutely invalid, yet there can be no evidence given of it by the assignee; the result would be, that the property would continue in him, without the power of disposing of the goods, or recovering them from a wrong-doer, in all cases in which the instrument should have been destroyed or entirely lost. The court would be very reluctant to adopt such a construction of a clause evidently intended for the benefit of the creditors, either by preserving evidence of the title of the assignee, and making it more secure, or perhaps affording a more easy mode of proving it; though the latter object, if it existed, has been defeated by a decision of this court in the case of *Gomersall* v. *Serle* (*a*). We do not, however, feel any difficulty in saying that the words of the section in question require no such construction; and that they mean only that the assignment *itself*, if offered in evidence, shall not be received, unless it shall have been first entered of record, but that any other legal evidence is admissible. If, therefore, the assignment is capable of being produced, it must be given in evidence, and must in fact be recorded; but if it is not capable of being produced, its contents may be proved by secondary evidence.

The construction insisted on by the plaintiffs would be productive of most mischievous consequences, and would leave it in the power of fraudulent or negligent

(*a*) 2 Y. & J. 5, where it was held, that if the assignment be produced, it is still necessary to prove its execution by the subscribing witness, *Hunt* v. *Conner*, *Guildhall*, 27 *Nov.* 1827, per Lord *Tenterden*, 1 Chitty's Statutes, 110, n. acc. But see *Tucker* v. *Barrow*, Moody & M. 139, n. decided by the same Chief Justice. Also sect. 97 of 6 *Geo.* 4. c. 16, making office copies evidence, and restraining the production of the originals.

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assignees to defeat the interests of the creditors, by destroying or losing the commission or assignment.

We think, for these reasons, that the evidence was properly received, and that the rule to enter a verdict for the plaintiff must be discharged.

Rule discharged.

See 5 *Geo.* 2. c. 30. s. 41. as to lost or mislaid commissions, depositions, proceedings, &c. not re-enacted in 6 *Geo.* 4. c. 16. s. 92., or 2 & 3 *Will.* 4. c. 114. s. 7.; *ante*, Vol. IV. 534, 542. In *Re Levett*, 1 Mont. & Ayr. R. 308, the court of review directed a new fiat to be issued where the original had been lost, adding, that a duplicate fiat had never been heard of.

YOUNG *against* BECK.

A capias issued since 2 *Nov.* 1832, (when 2 *W.* 4. c. 39. the uniformity of process act, came into operation) and following the form provided by that act, is not irregular, though issued on an affidavit sworn on a previous day before the deputy signer of the bills of *Middlesex* in the King's Bench. (See 3 & 4 *W.* 4. c. 67.)

In trespass for assault and false imprisonment, the defendant pleaded that the plaintiff being indebted to him, he sued out a capias, under which the plaintiff was detained. Replication, that *no* affidavit of the defendant's said cause of action was made before the officer who issued the said writ or his deputy, and filed, &c. Rejoinder, that an affidavit was made by defendant of his said cause of action before the deputy of the signer of the bills of *Middlesex*, and which signer, &c. was the officer who issued the writ. Surrejoinder, that the affidavit was so made by the defendant before the said deputy signer, on 15th *Oct.* 1833; and that the said signer was not, at the time of the making the said affidavit, an officer whose office it was or who had power to issue the said writ. *Quære*, if that was a departure?

TRESPASS. First count, for assaulting the plaintiff on 27th *November* 1833, and arresting him under colour of a supposed writ of capias issued out of the King's Bench, and imprisoning and detaining the plaintiff in prison. Second count, for assault and false imprisonment generally. Third count, for a common assault. Pleas: first, the general issue, not guilty; second, as to the assaulting, imprisoning, and detaining the said plaintiff in prison, as in the first count men-

tioned, the said defendant says, that before the time when &c., to wit, on the said &c., the said plaintiff was indebted unto him the said defendant in a certain sum of money, to wit, the sum of *25l.* 13*s.* 8*d.* for goods sold and delivered by him the said defendant unto the said plaintiff, and the said plaintiff then and there undertook and promised the said defendant to pay to him the said sum of money whenever afterwards he should be thereunto requested; but the said sum being wholly unpaid to the said defendant, and the said undertaking and promise wholly unperformed, he the said defendant, for the recovery of his damages by him sustained on occasion of the not performing of the said promise and undertaking of the said plaintiff, afterwards, to wit, on the day and year aforesaid, prosecuted out of the court of our lord the king, before the king himself, (the said court then and still being holden at *Westminster* in the county aforesaid,) against the said plaintiff a certain writ of our said lord the king, by which said writ our said lord the king commanded the sheriff of *Middlesex* that he should not omit by reason of any liberty in his bailiwick, but that he should enter the same and take the said plaintiff if he should be found in his said bailiwick, and him safely keep until he should have given him bail or made deposit with him according to law, in an action on promises at the suit of the said defendant, or until the said plaintiff should by other lawful means be discharged from his custody; which said writ, afterwards, and before the delivery thereof to the said sheriff of *Middlesex* to be executed as hereinafter mentioned, was duly marked and indorsed for bail for *25l.* 13*s.* 8*d.* according to the form of the statute in such case made and provided. And afterwards, at the said time, when &c., whilst the said writ was in full force, to wit, on the day and year aforesaid, the said plaintiff being then in custody of the

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said sheriff of *Middlesex* at the suit of other person or persons, the said writ so indorsed was delivered to the said sheriff of *Middlesex* by way of detainer against the said plaintiff, and in due form of law to be executed; and the said sheriff thereupon detained the said plaintiff for the cause aforesaid, as he lawfully might, which is the supposed trespass in the introductory part of this plea mentioned, whereof the said plaintiff hath in his said first count above complained against him. Verification.

Replication. Similiter to first plea. And the plaintiff, as to the plea of the defendant by him secondly above pleaded as to the said several trespasses in the introductory part of that plea mentioned, and therein attempted to be justified, saith, precludi non, because he saith that at the time of the said sheriff detaining the plaintiff for the cause aforesaid, as in the said plea alleged, there was no affidavit of the defendant's cause of the said action in that plea alleged made before any judge or commissioner of the said court of our lord the king before the king himself, authorised to take affidavits in the said court, or before the officer who issued the said writ, or his deputy, and filed according to the form of the statute in that case made and provided; nor was there any order, rule, or authority, of or from the said court, or of or from any one or more of the judges thereof, or of the judges of the court of our lord the king of the bench, or of the barons of our lord the king's Exchequer at *Westminster*, authorizing or empowering the defendant, or the said sheriff, or any other officer or person, to make the said detainer. Verification and prayer of judgment (*a*).

Rejoinder. And the said defendant, as to the said

(*a*) These pleadings were framed before *Reg. Gen. Hil. 4 Will. 4.* No. 9.

replication of the said plaintiff to the said second plea of him the said defendant, says, actionem non, because he says that before the suing out of the writ in the said plea mentioned, to wit, on the day and year aforesaid, an affidavit and affirmation of the said defendant's cause of the said action in that plea alleged, was made by the said defendant before the deputy of the signer of the bills of *Middlesex*, and which signer of the bills of *Middlesex* was the officer who issued the said writ, in and by which said affidavit and affirmation the said defendant (being one of the people called quakers) then and there solemnly affirmed that the said plaintiff was then justly and truly indebted unto him the said defendant in the sum of 25*l.* 13*s.* 8*d.* for goods sold and delivered by the said defendant to the said plaintiff, and at his the said plaintiff's request. And the said affidavit and affirmation so made as aforesaid, was then and there filed in the office of the said signer of the bills of *Middlesex*, commonly called the bill of *Middlesex* office, and was and continued to be so there affiled at the time of the sheriff so detaining the said plaintiff as aforesaid for the cause aforesaid, to wit, on the day and year aforesaid, in the county aforesaid. Verification and prayer of judgment.

Surrejoinder. And the said plaintiff, as to the said rejoinder of the defendant to the said replication of the said plaintiff to the said second plea of the said defendant says, that the said affidavit and affirmation of the said defendant's cause of the said action in that plea alleged was so made by the said defendant before the said deputy signer of the bills of *Middlesex* on the 15th *October* 1832, and the said signer of the bills of *Middlesex* was not at the time of the said defendant's making the said affidavit and affirmation as aforesaid, an officer whose office or duty it was to issue, or who

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had any power or authority to issue the said writ. Verification.

Demurrer. The said defendant says that the said surrejoinder is not sufficient in law, and in pursuance of the statute in such case made and provided, he states and shows to the court here the following, stating for causes, that the said surrejoinder attempts to put in issue a matter of law, namely, by whom the writ in the said surrejoinder mentioned should by law be issued, and concluding with a verification; so that if the said defendant had denied the matter therein mentioned, and issue had been taken thereon, the said matter of law must have been tried by a jury. And also that the said surrejoinder is argumentative and bad in this, that it states facts and matters from which the said plaintiff wishes the court to infer some irregularity in the swearing or affirming to the said affidavit and affirmation, and also that the said surrejoinder is bad in this, that it is a departure from the plaintiff's replication. Joinder in demurrer.

Archbold for defendant supported the demurrer. The question attempted to be raised on these pleadings is, Whether an affidavit to hold to bail, sworn before the deputy signer of the bills of *Middlesex*, before the act *2 Will.* 4. c. 39. for uniformity of process came into force, is valid so as to support a *capias* issued since that act. But that question will not arise, if, as I contend, the surrejoinder is bad as a departure from the replication. Now the replication alleges that there was *no* affidavit; while the surrejoinder admits there was, but insists that it was irregular. That is a departure, for it does not "maintain or fortify" the matter in the plaintiff's previous pleading (*a*). In *Comyns*'s Digest, tit. *Pleader* (F. 7.), the

(*a*) See Co. Lit. 304 a.

following instance of departure is given. "Debt on bond to perform an award. If the defendant pleads no such award, and the plaintiff shows such an award and assigns a breach, and the defendant rejoins that the award is bad, this is a departure, *Raym.* 94. 1 *Sid.* 180. 2 *Roll.* 692, *l.* 40; or that it was not made of all controversies, 1 *Lev.* 127 (*a*). So, if a bond be to perform covenants, and the defendant pleads performance, and a breach being assigned for non-payment of rent, rejoins, that he was expelled, *Ray.* 22. 1 *Sid.* 77. or that he has paid so much rent and so much for taxes, which makes up the whole demand for rent, 1 *Salk.* 228." *Praed* v. *Duchess of Cumberland* (*b*) is directly in point. That case was debt on an annuity bond, to which the defendant pleaded that there was *no* such memorial as the statute requires. The plaintiff replied that there was a memorial containing the names of the parties &c., and the consideration for which the annuity was granted. The defendant rejoined that the consideration was untruly alleged by the memorial to have been paid to both obligors, for that one of them did not receive any part of it. This rejoinder was held bad, as being a departure from the plea. *Ashurst* J. said, "The rejoinder is clearly a departure from the plea in bar; a memorial was inrolled which on the face of it was a good one, and if the defendant wished to impeach it she should have pleaded it, and shown in what particular it was defective, and thus have compelled the plaintiff to take issue upon that fact. But having in the plea in bar alleged that there was no memorial, she ought not afterwards to be permitted to

(*a*) See also *Harding* v. *Holmes*, 1 Wils. 122.

(*b*) 4 T. R. 585. Affirmed in error in the Exchequer Chamber, 2 Hen. Bla. 280, "on the ground that the rejoinder introduced a fact which went to vitiate the deed. See per *Bayley* J. in *Dudlow* v. *Watchorn*, 16 East, 41; *Chandless* arguendo, post.

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admit in her rejoinder that there was one, and then deny the validity of it." When that judgment was affirmed on error, *Eyre* C. J. stated the rejoinder to be clearly a departure from the plea. [*Parke* B. The objection there made was really and substantially to the bond, insisted on in the rejoinder, *viz.* that that bond was void, because *it* did not state the consideration truly. The rejoinder was doubtless quite beside the plea. *Eyre* C. J. adds, "the plea in effect states that there was no memorial; the replication alleges a memorial containing the requisites which the law requires; and then the rejoinder introduces a fact, which goes to vitiate the *deed*, but not the memorial." That case then does not apply.] Here, the surrejoinder does not show the affidavit bad on the face of it, but relies on its having been sworn before an unauthorized person—a ground which should have been raised on the replication. *Fisher* v. *Pimbley* (*a*) will be cited for the plaintiff. It was debt on a bond conditioned for performing an award. Plea, no award. Replication, setting out an award. Rejoinder, stating the whole award, in which were recited the bonds of submission, whereby it appeared that the award was not warranted by them, and it was held on demurrer that this was not a departure from or inconsistent with the plea; the reason being, that the award being bad on the face of it, but not being set out truly and entirely by the plaintiff in his replication, the defendant was at liberty to set it out as it was in fact in his rejoinder, and then demur to it when so set out, as being a nullity not made in the cause, thus maintaining his former allegation in the plea, that there was *no* award. The decision in *Dudley* v. *Watchorn and Another* (*b*), is also distinguishable. That was scire facias against bail on their

(*a*) 11 East, 188. (*b*) 16 East, 39. See 7 B. & Cr. 308.

recognizance. Plea, that before the issuing the first scire facias, *no* writ of ca. sa. by the plaintiff against the principal debtor was *duly* sued out &c. The replication stated a ca. sa. against *S.* issued into the county in which the venue in the action against him was laid, and a return of non est inventus; and a rejoinder, that the venue in the action against *S.* the principal was in *London*, was held no departure, on the ground that the plea did not allege that *no* ca. sa. was issued, but that none was *duly* issued, which was equivalent in effect to saying that no ca. sa. was issued in the manner required by the practice of the court to charge the bail. Had "duly" been left out of the plea in *Dudley* v. *Watchorn*, or if it had been inserted in this replication, the case would have resembled this.

But assuming that there was no departure, the question first above stated arises, depending on the construction of 12 *G.* 1. c. 29. s. 2. which enacts, that in all cases where the plaintiff's cause of action shall amount to the sum of 10*l.* or 40*s.* or upwards, "affidavit shall be made and filed of such cause of action, which affidavit may be made before any judge or commissioner of the court out of which such process shall issue, authorized to take affidavits in such courts, or else before the officer who shall issue such process or his deputy, which oath such officer or his deputy is hereby *empowered* to administer." That language is strongly contrasted to that of the first section, and is directory only as to the persons before whom the affidavit is to be made; so that if sworn before a proper officer in a form on which perjury might be assigned, it is sufficient. The question here is, whether the affidavit is void? and not as in *Beck* v. *Young* (*a*) whether it was so far irregular as to entitle a defendant arrested

(a) 2 Dowl. P. C. 462. Bail Court of K. B. The defendant in that action being discharged, brought the present action.

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under process founded on it, to be discharged from that custody? a point which was there held in the affirmative by *Parke* J. For all that is necessary to be here established, in order to show this to be a departure, is, that the affidavit is not a nullity. That case, therefore, need not be disputed. Perjury could be assigned on this affidavit as on one sworn before the person who was the proper officer at the time. [*Alderson* B. That is the question, and is not to be assumed. *Parke* B. If perjury could be so assigned my decision was wrong.] If the second section is peremptory and not directory only, no one could be held to bail on a foreign affidavit, because it had not been sworn before a judge, &c. &c. [*Parke* B. The act did not mean to touch that case, where arrest takes place under a judge's order (*a*), but only to set bounds to the plaintiff's right of arrest.] It was usual in practice to issue writs on affidavits not sworn before the officer who issued the writ; *e. g.* to issue a latitat on an affidavit sworn before the signer of the bills of *Middlesex* (*b*). [*Alderson* B. That was on the ground that it was a continuation of the same process. Thus, where a capias was issued into *Sussex* on an affidavit sworn before and filed with an officer who was deputy filacer for *Sussex*, and also for *Cornwall*, and was returned non est inventus, it was held, since *2 Will.* 4. c. 39, that an alias capias might be issued by continuance into the latter county on the same affidavit, *Coppin* v. *Potter* (*c*).] It had been previously decided in *Evans* v. *Bidgood* (*d*), that where the filacer for *Cambridgeshire* was the proper officer to issue writs

(*a*) Tidd, 9 ed. 166.
(*b*) *Baker* v. *Allen*, 7 B. & Cr. 526.
(*c*) 10 Bing. 441.
(*d*) 4 Bing. 63. See per *Best* C. J. id. 65.

into *Devonshire*, an affidavit sworn before him, on which a capias had issued into *Cambridgeshire*, without a previous original, was held sufficient to support a testatum capias into *Devonshire*. [*Alderson* B. In *Richards* v. *Stuart* (*a*) it was held, that a fresh affidavit was not necessary to the issuing a new writ after discontinuing the action, where the second proceeding was with the same filacer who issued the first. But the question here is, whether it is sufficient that the affidavit was sworn before a person who at the time had authority to issue *a* writ, but not *the* writ which afterwards issued, and is now sub judice; no such form of writ being in existence at the time of swearing the affidavit.] That case is in the defendant's favour, for by discontinuance the suit was at an end, and the defendant is not driven to argue this to be a continuance of the first writ. [*Alderson* B. The difference between the cases is, that, in that cited, the plaintiff pledged his oath by an instrument on which perjury could have been assigned; whereas it is a question whether that could have been done here. In *Richards* v. *Stuart*, *Tindal* C. J. after stating section 2 of 12 *G.* 1. c. 29. says, "all that the fair import of these words demands has been done in the present instance. An affidavit of the cause of action *has* been made and filed; of the cause for which the defendant is now arrested; for there is no pretence for saying that the first arrest was for a different cause of action. But it has been urged that the deponent could not be indicted for perjury. I am unable to perceive why he should not, if the affidavit be untrue; for if he uses it for the second arrest, it *is* the affidavit of the cause of action in that proceeding."

(*a*) 10 Bing. 322; 3 Moore & S. 778, *S. C.* See acc. *Dorville* v. *Whoomwell*, 10 B. M. 320; *S. C.* 3 Bing. 59; and *Boyd* v. *Durand*, 2 Taunt. 161, as commented on by *Park* J. in 10 B. M. 40.

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Now, you say that at the time of swearing the affidavit the officer had power to issue process, and that at the time it actually issued he remained the officer before whom the affidavit was sworn.] If the new writ of capias is not, when necessary, taken as a good continuation of a bill of *Middlesex*, so as to authorize taking the body, injustice will ensue. For if a bill of *Middlesex* were issued before the uniformity of process act 2 *Will.* 4. c. 39. in order to save the statute of limitations, but not served, the issuing a capias will be the only present mode of preventing a plea of the statute, all other process being abolished by that act, and the office of signer of the bills of *Middlesex* being virtually abolished by 3 & 4 *Will.* 4. c. 67. s. 1., which enacts, that *all* writs of summons, distringas, capias and detainer, issued into *Middlesex* from K. B., shall be signed, sealed, and issued, and the fees thereon taken and accounted for by the same persons, and in like manner, as all other writs of summons &c. issued from that court under 2 *Will.* 4. c. 39. [*Parke* B. What in that act prohibits the officer from signing and issuing writs in continuation of old process in an action commenced before it came into operation? (*a*)] That act, though it alters the functions of the officers as to process, relates only to writs issued after its passing, viz. 28 *August* 1833, in compliance with 2 *Will.* 4. c. 39. and does not prove the point for which it is cited. The difficulty is, that by the act 12 *G.* 1. c. 29. s. 2. no officer has jurisdiction to take the affidavit, unless he actually issues the writ. Here, the affidavit was not made before the officer who afterwards actually issued the writ. That jurisdiction is suspended and cannot be known till he actually issues the writ. The case would be otherwise in the instance of an affidavit taken before a judge or

(*a*) See *Finney* v. *Montague*, 2 Nev. & Mann. 804.

commissioner, who have absolute jurisdiction not depending on the chance of their filling some other character. The framer of 12 *G.* 1. no doubt contemplated that the making the affidavit and issuing the writ would be cotemporaneous acts.

Chandless in support of the surrejoinder. According to well-known rules, if a party's latter pleading contains matter which, though new, maintains and fortifies his former pleading, without contradicting or deserting the ground there taken, it is no departure (*a*). Tried by that test, this surrejoinder maintains the replication, for it shows that there was no legal affidavit; and if there was not, then there was no affidavit at all, which is the ground taken in the replication. Now, it is not contended that the affidavit is otherwise than valid, but *Praed* v. *Duchess of Cumberland* was relied on to show a departure. That case was affirmed in error on a different ground from that on which it proceeded in the King's Bench, and when cited in *Dudley* v. *Watchorn* was thus noticed by *Bayley* J. "The ground on which that judgment was affirmed in error was, that the rejoinder introduced a fact which went to vitiate the deed granting the annuity, and not to show that there was no memorial of the bond." The decision of *Praed* v. *Cumberland* in the King's Bench, though arising on an annuity bond, seems to have proceeded very much on the case of an award, cited from *T. Ray.* 94. Mr. Justice *Buller* saying, that "in the case of an award, if there be an award in fact, the party cannot, on the trial of an issue of *no* award, go into objections to the award in point of law.] But that is contradicted by *Fisher* v. *Pimbley* (*b*), where the question arose on an award, and Lord *Ellenborough* said, "The

(a) See Co. Lit. 304 *a.*, 2 Saund. R. 84 n. (1).
(b) 11 East, 192.

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award being bad, the only question is, whether the defendant can show such bad award in his rejoinder, consistently with his former allegation in the plea, that there was no award? He thereby (by setting out the award in fact), still maintains his former allegation, that there was no award; in other words, that there was no legal and valid award under the submission, which is the same as no award. There is no inconsistency in this, and therefore no departure." The case of the *Abbott of Strata Marcella* (a) had before settled, that an averment that an act has not been done, is the same as alleging that it has not been legally done. Then *Dudlow* v. *Watchorn* is in point, as following up that doctrine, and also showing that new facts showing that a ca. sa. admitted to be issued was no legal ca. sa., only maintained by expanding that stated in a former pleading, viz. that there was no ca. sa. and therefore no departure.

[*Parke* B. Might not the plaintiff have replied, that though an affidavit of the defendant's cause of action in the plea alleged was made by the defendant before the deputy of the signer of the bills of *Middlesex*, which signer was the officer who issued the writ, yet that at the time the writ was actually issued he had not authority to issue it, and that the writ he so issued was a process not then known to the law? Here the replication admits the facts laid in the plea, and denies another fact which is asserted in the surrejoinder, and there shown to be illegal.]

Secondly, it is established by a series of decisions upon 12 *G.* 1. c. 29. s. 2., that an affidavit of debt sworn before an "officer," as there provided, must be sworn before the same officer who issued the writ; *Dalton* v. *Barnes* (b), *Boyd* v. *Durand* (c), *Anderson* v.

(a) 9 Rep. 24 a. (b) 1 M. & S. 230. (c) 2 Taunt. 161.

Hayman (*a*), *Morrison* v. *Muspratt* (*b*), *Dorville* v. *Whoomwell* (*c*), *Baker* v. *Allan* (*d*). The plaintiff insists that no affidavit was made before issuing the process. The officer who issued it, though the same man, was not the same officer; for his office, viz. his duties and privileges, had been changed by statute in the interval. Now 12 *G.* 1. c. 29. requires not identity of person, but of character, at the time the writ is issued. [*Alderson* B. In *Rodwell* v. *Chapman* (*e*), it was held, that where a writ of capias was issued into *London*, on an affidavit of debt, and no proceeding was taken on it, another original capias might be issued into *Essex* on the same affidavit, without issuing an alias capias into the second county, according to *Reg. Gen. M.* 3 *Will.* 4.] There it did not appear that the same officer had not power to issue the writs into both counties at the time of his taking the affidavit. [*Alderson* B. In *Richards* v. *Stuart* the court seemed to think that the affidavit was sufficient if perjury could be assigned on it. *Parke* B. How does it appear that the process was issued after the uniformity of process act came into operation? (*f*)] The courts will judicially recognize the form of this capias to be that provided by 2 *Will.* 4. c. 39. Besides, the time laid in the declaration, though laid under a *viz.* must be taken to be truly laid, no issue having been raised on it (*g*).

Cur. adv. vult.

(*a*) 2 B. M. 192. (*b*) 4 Bing. 60.
(*c*) 10 B. M. 129; *S. C.* 3 Bing. 39.
(*d*) 7 B. & Cr. 526.
(*e*) 1 Cr. & M. 70.
(*f*) Viz. *November* 2, 1832. The affidavit appears from the surrejoinder to have been sworn on 15th *October* 1832.
(*g*) See 3 B. & Cr. 324; 2 B. & Ald. 586; 3 B. & Ald. 607; 5 B. & Ald. 847; 1 Br. & B. 370; 8 B. & Cr. 340; 3 B. M. 740; Moor. 678.

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The judgment of the court was now delivered by PARKE B.—Several questions arose upon this record; but as the court are of opinion in favour of the defendant upon the principal point, it is unnecessary to advert to the other objections which were urged on his part.

The plaintiff contends that the process of capias under which the defendant justified, and which was issued since the passing of the *2 Will.* 4. c. 39. by the deputy signer of the bills of *Middlesex*, upon an affidavit sworn before the same officer on a day anterior to the passing of the act, was void, because it is alleged to be essential that the officer who takes the affidavit should, at the time of administering the oath, have the power by law to issue the process, which he afterwards does issue; and it was insisted that the deputy signer of the bills of *Middlesex* had not, on the 15th *October* 1832, when the affidavit was made, any authority to issue the new capias given by the uniformity of process act; and the decision in this same case of *Young* v. *Beck*, reported in *2 Dowling's Practice Reports*, 462, before me, sitting in the bail court in the King's Bench, was relied upon.

I certainly did so decide, and directed the now plaintiff to be discharged on entering a common appearance, under the impression that the capias given by the act was altogether a *new* process, dissimilar from that which existed before, and that the deputy signer of bills of *Middlesex* before the act passed, had no power to issue any *such* process. That point seems to have been taken for granted on the argument in the King's Bench on all sides.

My brothers are of opinion that my decision was wrong, and upon more attentively considering the effect of the act of parliament, I concur with them.

It does not appear to us that the writ of capias, in the form directed by the statute, is altogether a *new* process. It is a writ directed to the sheriff of *Middle-*

sex, commanding him to take the body of the defendant, as the bill of *Middlesex* did before; and though it is not returnable in the same manner, and differs in other respects, it is still the same kind of process which existed before against the person. Suppose, instead of the act of parliament prescribing the form of the process against the person, a rule of court had ordered the omission of the name of the nominal co-defendant, or of the mention of "the custom of the court," or other similar matter, there could be no doubt but that the process would have continued the same, and could have been issued after such a rule of court, on an affidavit sworn before it. Can it be deemed less the same process as before, because alterations are made by the statute, and the return is uncertain instead of fixed, and other matters are introduced into the writ addressed to the defendant himself? It is not immaterial to observe, that the act of parliament with respect to writs of summons which are addressed to the party instead of the sheriff, and in no respect resemble the old serviceable process, does contain a provision (*a*) that they shall be issued by the same officer by whom serviceable process was before issued; but it is silent with respect to writs of capias, probably because the legislature considered such a provision unnecessary, as the nature of the writs remained the same, and the same officers would, as a matter of course, continue to issue them.

We, therefore, think that this affidavit was properly taken, having been sworn before the deputy signer of bills of *Middlesex*, who had at the time power to issue a writ against the person into *Middlesex*, and did afterwards issue such a writ. Consequently our judgment must be for the defendant.

Judgment accordingly.

(*a*) *In sect.* 1. Now repealed by 3 & 4 *Will.* 4. c. 67. s. 1.

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My brothers are of opinion that my decision was wrong, and upon more attentively considering the effect of the act of parliament, I concur with them.

It does not appear to us that the writ of capias, in the form directed by the statute, is altogether a *new* process. It is a writ directed to the sheriff of *Middle-*

thereof, to the said *A. Billing*, his executors, &c.; and the said moieties to be respectively paid by equal quarterly payments, on the 30th of *January*, 30th *April*, 30th *July*, and 30th *October* in every year, clear of any deductions for taxes, rates, assessments, or any other matter whatsoever; the first payment of the said annuity or yearly sum to become due and be made on 30th *January* then next ensuing, provided the said term should be then continuing; and in case the said term should determine by the death of the said plaintiff and *E. L.*, *A. Billing* and *J. E. B.*, or the survivors or the longest liver of them, between or in the interval of any two of the said quarterly days of payment, or before the said 30th of *January* then next, then that in either of such cases happening, the said defendant and the said *R. Drinkwater*, their heirs, executors, and assigns, should and would in like manner, in the moieties aforesaid, on demand thereof, well and truly pay or cause to be paid unto the said plaintiff and the said *A. Billing*, their executors, administrators, and assigns, such part of the said annuity or yearly sum of 30*l.* as should be in proportion to the number of days which should have elapsed prior to the date of the decease of the survivors or longest liver of them the said plaintiff and the said *E. L.*, *A. Billing*, and *J. E. B.*, and after the day of payment next or immediately preceding that event, if such event should happen after the 30th day of *January* then next ensuing. Breach, that on 30th *April* 1833, 50*l.* of the said annuity, for the plaintiff's share, proportion, and moiety thereof, for four years and two quarters next before and ending on the day last aforesaid, was due from defendant to plaintiff, and is still in arrear, contrary to the said indenture and the said covenant of the said defendant.

The second count was upon another indenture dated 30th *July* 1830, granting an additional annuity of 10*l.*

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My brothers are of opinion that my decision was wrong, and upon more attentively considering the effect of the act of parliament, I concur with them.

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the seven days' notice in writing was not dispensed with, as in the said last-mentioned plea alleged, replied, that the said plaintiff and the said *A. Billing* did not accept, receive, or take the sum of 307*l.* 16*s.*, in the second plea mentioned, as and in full for the repurchase and redemption of the said annuity in the said first count mentioned, nor did the said defendant and the said *R. Drinkwater*, or either of them, pay to the said plaintiff and the said *A. Billing*, or either of them, the arrears of the said last-mentioned annuity; nor did the said defendant nor the said *R. Drinkwater* repurchase or redeem the same annuity according to the indenture in the first count mentioned, in manner and form as the said defendant hath above in his said second plea in that behalf alleged; concluding to the country. There were similar pleadings to the second count.

The indenture of 30th *October* 1828, as set out on oyer, craved in the first plea, was between defendant and *R. Drinkwater* of the first part, and the plaintiff and *A. Billing* of the other part. After reciting a will under which the *Drinkwaters* derived certain beneficial interests, and that they had contracted and agreed with the plaintiff and *A. Billing* for the sale to them of an annuity of 30*l.*, to be secured and payable to them thenceforth for the term of 99 years, determinable as therein mentioned, but to be repurchaseable under the proviso for that purpose thereinafter contained; and that the true consideration to be paid for the purchase of the said annuity was the sum of 300*l.*; and that in pursuance and part performance of the agreement, the *Drinkwaters* had that day executed a warrant of attorney, authorizing certain attornies to confess a judgment against them in an action of debt at suit of the said plaintiff and *A. Billing*, for the sum of 600*l.* and costs of suit, with a defeazance, &c.: it was witnessed, that in pursuance of the said agreement, and of the

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The judgment of the court was now delivered by PARKE B.—Several questions arose upon this record; but as the court are of opinion in favour of the defendant upon the principal point, it is unnecessary to advert to the other objections which were urged on his part.

The plaintiff contends that the process of capias under which the defendant justified, and which was issued since the passing of the *2 Will.* 4. c. 39. by the deputy signer of the bills of *Middlesex*, upon an affidavit sworn before the same officer on a day anterior to the passing of the act, was void, because it is alleged to be essential that the officer who takes the affidavit should, at the time of administering the oath, have the power by law to issue the process, which he afterwards does issue; and it was insisted that the deputy signer of the bills of *Middlesex* had not, on the 15th *October* 1832, when the affidavit was made, any authority to issue the new capias given by the uniformity of process act; and the decision in this same case of *Young* v. *Beck*, reported in *2 Dowling's Practice Reports*, 462, before me, sitting in the bail court in the King's Bench, was relied upon.

I certainly did so decide, and directed the now plaintiff to be discharged on entering a common appearance, under the impression that the capias given by the act was altogether a *new* process, dissimilar from that which existed before, and that the deputy signer of bills of *Middlesex* before the act passed, had no power to issue any *such* process. That point seems to have been taken for granted on the argument in the King's Bench on all sides.

My brothers are of opinion that my decision was wrong, and upon more attentively considering the effect of the act of parliament, I concur with them.

It does not appear to us that the writ of capias, in the form directed by the statute, is altogether a *new* process. It is a writ directed to the sheriff of *Middle-*

annuity or yearly sum of 30*l.* as shall be in proportion to the number of days which shall have elapsed prior to the day of the decease of the survivor of them. [Here followed the assignment by the *Drinkwaters* of some bank annuities, and of a reversion in certain meadow ground, to the plaintiff and *A. Billing* jointly, for the better securing the payment of the said annuity, with a joint power of attorney to them to enter up a joint judgment, and a joint power to them by distress or sale of the reversion of the lands, and by transfer of the stock, to obtain payment of the annuity, and all arrears thereof.] Provided always, and it was thereby declared and agreed by and between the said parties thereto, that in case the said *Drinkwaters*, their heirs, executors, or administrators, or either of them, should at any time thereafter be desirous of redeeming or repurchasing the said annuity or yearly sum of 30*l.*, and of such their or his intention, should give unto the said plaintiff and *A. Billing*, their executors &c., seven days' notice in writing, then that said plaintiff and *A. Billing*, their executors or administrators, should and would, at the expiration of the said notice, on receiving all arrears of said annuity, and all costs and charges paid or incurred by them in the premises, accept, receive, and take the sum of 307*l.* 10*s.*, as and in full for the repurchase or redemption of the said annuity; and on receipt thereof, and of all arrears of the said annuity as aforesaid, deliver up the said indenture to be cancelled, and at the costs and charges of said *Drinkwaters*, their heirs, &c. acknowledge, or cause satisfaction to be acknowledged on the record of the judgment which should be entered upon the warrant of attorney, and release and reassign the said close of meadow ground, stocks, parts, and shares of bank annuities, residuary estate, and premises, unto the person or persons so redeeming or repurchasing

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set that up as a binding agreement, but being by parol only it could not affect a writing under seal (a).

Kelly and *Ball* showed cause. First, as to arrest of judgment or repleader. The replication has taken issue, not on the acceptance only, but has also alleged that neither the defendant nor *R. Drinkwater* paid to the plaintiff and *A. Billing*, or either of them, the arrears of the annuity, or repurchased or redeemed the same. The issue then being taken on the substance of the plea, is not immaterial, and if either of its allegations is true, the plea is answered. It is too late to consider whether the replication is double, as that question can only be raised on special demurrer (b). [*Parke* B. It was so difficult to say whether the plea was rested on the proviso in the deed for redeeming the annuity, or on accord and satisfaction, that the plaintiff did wisely to waive the right to demur and take the present issue.] The deed was not to be delivered up to be cancelled, or the annuity to cease, till the arrears were paid up and the annuity repurchased. Both those requisites are traversed by the replication, and both found for the plaintiff. Next, as to arresting the judgment. It is said that the covenant is joint with both covenantees,

(a) See *Blake's* case, 6 Rep. 43 *b.*; *Braddish* v. *Thompson*, 8 East, 344, 346; *Rogers* v. *Payne*, 2 Wils. R. 376; *Hayford* v. *Andrews*, Cro. El. 397; *Blennerhassett* v. *Pierson*, 3 Levinz. 234, (cited by *Gibbs* C. J. in *Thompson* v. *Brown*, 4 Taunt. 671;) *Sellers* v. *Bickford*, 8 Taunt. 30; *Lowe* v. *Egington*, 7 Pri. R. 605; *Bulteel and another* (in error) v. *Jarrold*, 8 Pri. 467, 474; *Dawes* v. *Prendergrass*, 5 B. & Ald. 187, 6 Madd. R. 124, *S. C.*; *Rex* v. *Wait*, 1 Bing. 127; Vin. Ab. tit. Defeazance; *Blake's* case, 6 Co. 43 *b.*; *Preston* v. *Christmas*, 2 Wils. 86; *Rogers* v. *Payne*, 2 Wils. 376; *Cupit* v. *Jackson*, M'Lell. 495; *Gilbert* v. *Wetherell*, 2 Sim. & Stu. 254; *Heming* v. *Gurney*, Dom. Proc. 1 Dow. (N. S.) 35, 1 Bligh. (N. S.) 479, 2 Sim. & Stu. 311, 320; *Rex* v. *Bingham*, 3 Younge & J. 103. Also 3 T. R. 892, 2 Atkyns, 560. 1 Ves. 339. 2 Ves. 569. 18 Ves. 20. Chanc. R. 47. 3 Meriv. 272.

(b) 1 Wms. Saund. 337 n., 3 Com. Dig. tit. Pleader (E. 2.)

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and consequently that *A. Billing* should have been made a co-plaintiff. But taking the whole of the covenant together, though the words in the early part of it would make it a joint covenant as contended for, yet the subsequent words "in the shares and proportions following, viz. the sum of 15*l.*, being one moiety of the said annuity, unto the said *T. Lane*, his executors, &c. and the sum of 15*l.*, the remaining moiety thereof, unto the said *A. Billing*, his executors, &c." clearly shows that the interest in the covenant is several. Then the covenant must be taken to be also several, as appears from the notes of Serjt. *Williams* to *Eccleston* v. *Clipsham* (*a*): "Though a man covenant with two or more jointly, yet if the interest and cause of action of the covenantees be several and not joint, the covenant shall be taken to be several, and each of the covenantees may bring an action for his particular damage, notwithstanding the words of the covenant are joint." *James* v. *Emery* (*b*), affirmed in error in the Exchequer Chamber (*c*), shows that if the interest of covenantees is several, they may maintain several actions, notwithstanding the words of the covenant are joint." *Owston* v. *Ogle* (*d*) turns on the same principle. [*Alderson* B. *Servante* v. *James* (*e*) carried it still further. There, a covenant by the master of a vessel with the several part owners, and their several and respective executors, administrators, and assigns, to pay certain monies to them, and to their and every of their several and respective executors, &c. at a certain bankers, and *in such parts and proportions* as were set against their several and respective names, was held to be a several covenant upon which each covenantee must sue severally in respect of his several

(*a*) 1 Saund. 153 n. (*b*) 8 Taunt. 245.
(*c*) 5 Pri. 529, *S. C.* See judgment of *Gibbs* C. J. (*d*) 13 East, 538.
(*e*) 10 B. & C. 410.

interest, and could not maintain a joint action. *Parke* B. If the principle now contended for is correct, it was a grant of two annuities, and the objection should have been taken at the trial that the deed was not stamped with two stamps (*a*).] *Withers* v. *Bircham* (*b*) is in point. A deed reciting the previous grant of two distinct annuities to *A.* and *B.* during the life of the grantors and the survivor, witnessed, that *C.* covenanted with *A.* and *B.* and their executors to pay the annuities or either of them when the grantors should make default in payment; and it was held that the interest in the annuities being several, the covenant was also several, and that the annuity granted to *A.* being in arrear, his executor might maintain an action against *C.*

Merewether Serjt. and *F. N. Rogers* supported the rule. First, the plea is framed on the proviso in the deed, by which if the grantors of the annuity pay the arrears and the sum fixed for its repurchase, the duty is cast on the plaintiff to accept it. As the plea states the arrears and redemption money to have been paid with the plaintiff's consent, it was tautology to aver his acceptance of the latter sum; and as all remedies for recovering the annuity were to cease on payment of the money, the averment of such acceptance was immaterial, and it was unnecessary to plead any thing in the nature of an accord and satisfaction. Then the replication has taken an immaterial traverse.

As to the arrest of judgment, the principle that where the interest of covenantees is several they may sue severally, is admitted. But if their interest in the

(*a*) See *Doe* v. *Day*, 13 East, 241; *Boase* v. *Jackson*, 3 Br. & B. 185; *Waddington* v. *Francis*, 5 Esp. 182.

(*b*) 3 B. & Cr. 254, 5 D. & R. 186, S. C. See 5 Pri. 533, 2 Burr. 1190, 3 Taunt. 89, 5 T. R. 522, Touchstone 166, Bac. Ab. tit. Covenant (D.), Vin. Ab. tit. Covenant (M. a.), 5 Co. 23 *a*.

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performance of the covenant is joint, it is equally clear that the action must be also joint; *Anderson* v. *Martindale* (*a*). Now the words of this deed show that the interest taken by the covenantees was joint and not several; the only separation being as to the mode of payment in moieties, which does not affect the interest, and was merely for the convenience of the plaintiff and *A. Billing*. The purchase was joint, the consideration being single, and recited as paid by both plaintiff and *A. Billing*. The covenantees treat this as a covenant to pay one annuity of 30*l.* to these two covenantees, their heirs, executors, administrators, or assigns, not their *respective* heirs, executors, administrators, or assigns. The repurchase money is to be paid in one sum to both "severally and respectively." Nothing is ever made necessary to be done by the covenantees; whereas the obligation of the covenantors is made several throughout. Now no case appears in which the covenant, as available by the covenantees, has been held to be several, without the introduction of words of severalty. In *Servante* v. *James* the words of covenant relied on by the covenantees were several and respective throughout. In *Withers* v. *Bircham* the annuities held to be several were granted by separate deeds, and the action was on an indenture securing the payment of the said annuities, or either of them, if the grantors should make default in payment of *either of them*. On *Anderson* v *Martindale* being there cited, *Bayley* J. said (*b*), the covenant in that case was to pay *one* annuity to one of the two covenantees; and consequently the party suing had no separate interest of his own. But *Anderson* v. *Martindale* is a stronger authority than is here requisite. There, a covenant to and with

(*a*) 1 East, 497, 2 Saund. 11. notis, 1 Saund. 154. notis.

(*b*) 5 D. & R. 109, 3 B. & Cr. 256. See also *Southcote* v. *Hoare*, 3 Taunt. 87; *Scott* v. *Godwin*, 1 B. & P. 67, 2 Br. & B. 333, and 3 M. & S. 308.

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demption to either, the annuity would be at an end. Both these circumstances confirm the defendant's position, that this annuity was treated as *one* and single.]

Cur. adv. vult.

The judgment of the court was now delivered by

PARKE B.—who, after stating the pleadings and the verdict, continued thus:—Upon this record three objections were made.

First, that notwithstanding the finding on the second issue, the replication admitted a sufficient part of the plea to bar the action; and therefore that the defendant was entitled to judgment non obstante veredicto.

Secondly, that if this was not so, there was an immaterial issue; and,

Thirdly, that the action could not be brought by this plaintiff alone, and therefore the judgment ought to be arrested.

The last objection is in the opinion of the court well founded, and it is therefore unnecessary to give any opinion on the others, though we have no difficulty in saying that they would not have prevailed.

The rule is clearly established, that though a man covenants with two or more persons, using words which primâ facie import a joint covenant, yet if the interest and cause of action of each of the covenantees appears on the face of the deed to be several, the words will be taken disjunctively, and the covenant will be construed to be a several covenant with each, and each covenantee may bring an action for his particular damage; *Eccleston* v. *Clipsham* (*a*). The question is, whether the interest in the money covenanted to be paid in this case

(*a*) 1 Saund. R. by Wms. 154, and notes.

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Ways, in the parish of *Edgbaston*, to *Easy Row* in *Birmingham*, and for otherwise putting the said act into execution. And it was further enacted, that the said trustees might, and they were thereby authorized to continue all or any of the toll-gates and toll-houses which had been erected in, upon, or across any part of the said road, by virtue of the said acts, and should and might erect or cause to be erected such and so many other toll-gates and toll-houses in, upon, or across any part of the said road by this act directed to be widened, varied, improved, or kept in repair; and also such and so many toll-gates and toll-houses by the sides of the said road, and in, upon, and across any street, lane, or bye-way, that did or should lead into or out of the same, as they the said trustees should think proper or expedient, subject to such restrictions and directions as were thereinafter mentioned, and to provide the said toll-houses with a garden and proper conveniences: Provided nevertheless, that no toll-gate should be erected between the said place called *Five Ways* and the town of *Birmingham*. It was further enacted, that it should be lawful for the said trustees and their collectors to demand and take the tolls and duties therein particularly mentioned, subject to the restrictions thereinafter contained, at the toll-gates or toll-bars, or side-bars or side-gates already erected on the said road, by virtue of the acts thereby repealed, and which by virtue of the now reciting act should be continued or erected upon or across or by the side or sides of the said road.

And after directing the amount of the tolls and the time of payment, and limiting the number of tolls to be taken on each day, the act contained a section declaring certain exemptions from toll, as carriages conveying materials, the king's mails, his majesty's troops, persons going to places of worship, or attending funerals, &c.: and at the close of that section was the following

proviso: "Provided always, that no tolls shall be demanded or taken for any horse, cattle, or other beasts which shall not go or pass more than 100 yards on the said road."

In pursuance of the powers of the above act, the trustees continued a toll-gate previously erected at the *Five Ways*, in the parish of *Edgbaston*, and within about two yards of the boundary line between that parish and the town of *Birmingham*, one of the termini of the said road. And until the passing of the act next hereinafter mentioned, they repaired the turnpike road not only from *Blackdown Pool* to the said gate at the *Five Ways*, but also from the said gate to *Easy Row* in the town of *Birmingham*. The road between the said gate and *Easy Row* is about three quarters of a mile long.

By an act 9 *Geo.* 4. intituled "An act for better paving, lighting, watching, cleansing, and otherwise improving the town of *Birmingham* in the county of *Warwick*, and for regulating the police and markets of the said town," after repealing a prior act for the same purposes, certain persons therein named are appointed commissioners for paving and repairing the highways of *Birmingham*, and for the other purposes mentioned in the title of the act; and they are authorized to raise money to direct and to carry the act into execution by rates and assessments on the inhabitants of the town. By this act it is enacted, that it should not be lawful for the trustees of any turnpike road to repair any part of such road which should lie or be situate within the town of *Birmingham*, but so much and such part of every turnpike road as should be situate within the said town should be from thenceforth made and maintained by the said commissioners thereby appointed.

Since the passing of the last-mentioned act, the trustees of the *Hagley* turnpike road appointed under the

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said act 58 *Geo.* 3. have ceased to repair the road between the *Five Ways* and *Easy Row*, being, as above-mentioned, about three quarters of a mile long, because it is in the town of *Birmingham*. The commissioners of the *Birmingham* street act 9 *Geo.* 4. above-mentioned, have repaired, and do now repair the said road up to the *Five Ways*, and to within two yards of the said turnpike gate.

At the time of passing the said last-mentioned act, the tolls of the said turnpike road, including the part in question, had been and were then leased out by the said trustees, and the moneys which had been borrowed or become due and owing on the credit of the said tolls, as well those which became due and owing under the present turnpike act, as those for the repayment of which the new tolls granted by the said act (58 *Geo.* 3.) were made subject and liable, were not nor are they yet paid off. The sum of 7000*l.* was then and still is due on the credit of the tolls. Part of the said 7000*l.* was expended in the purchase of land, which was wanted and used for the purpose of widening that part of the said road which lies between the limits of the town of *Birmingham*, and the trustees are now further liable to the annual payment of 11*l.* 16*s.* 3*d.*, which sum was awarded to be paid annually by the said trustees to one *R. S. Skey* or his representative, during the continuance of a certain building lease then held by the said *R. S. Skey* as a compensation for his interest as lessee in certain building land also required and taken for widening the same part of the road between the *Five Ways* gate and *Easy Row*. If the tolls now paid at the *Five Ways* toll gate by persons claiming exemption under the said 9 *Geo.* 4. were taken away, the tolls received on the said turnpike road would be materially diminished, and the securities of persons to

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withdrawn from the operation of stat. 58 *Geo.* 3. by the *Birmingham* improvement act stat. 9 *Geo.* 4., toll is no longer payable under the first-mentioned act in respect of passing over it. For the burden of maintaining that portion of the whole road described in 58 *Geo.* 3., viz. from *Blakedown Pool* in the parish of *Hagley*, to *Birmingham* in the county of *Warwick*, is now cast on the commissioners appointed under the *Birmingham* improvement act 9 *Geo.* 4. That act does not simply transfer the burden of repairing this portion of the road to them, but goes on to enact, "that it shall not be lawful for the trustees of any turnpike-road to repair any part of such roads as lie or be situate within the town of *Birmingham*." That enactment distinguishes this case from *Pope* v. *Langworthy* (*a*) and *Bussey* v. *Storey* (*b*). In the latter case a cart had passed over more than 100 yards of a road, if a part which the county were liable to repair, as being within 300 feet of a county bridge (*c*) were included, but less than 100 yards if that part were excluded. It was said that as the trustees of the road could not be justified in repairing that part (*d*), they ought not to demand toll for passing over it. *Parke* J. observed, "It is true they are not likely to be called upon to do so, because the county is in general provided with an ample fund to fulfil its obligations to repair fully and effectually; but if the reverse should happen to be the case, and the public exigency should require it, we do not know that the trustees might not expend money in repairing this part of the road." Here the trustees who had power to raise the tolls under 58 *Geo.* 3., and were also liable to repair the whole road from *Blakedown Pool* to *Easy Row*, are expressly prohibited by 9 *Geo.* 4. from repairing that part of the road which lies between *Five*

(*a*) 5 B. & Adol. 966. but see *post*, 65.
(*b*) 4 B. & Adol. 98.
(*c*) 22 *H.* 8. c. 5. s. 9.
(*d*) 52 *G.* 3. c. 110. s. 5.

Ways and *Easy Row*. Then as their duty of repairing is no longer commensurate with the burden imposed by way of toll, it cannot longer remain payable. The toll imposed in 1818 was only a compensation for the repairs of the whole line; if it can still be taken, the trustees will be entitled to the whole toll for repairing a part only, and the repair of the road between the *Five Ways* and *Easy Row* will be twice paid for by passengers. Those who seek to impose a burden on the public must show that plain and unambiguous language has been used; *Company of Proprietors of the Leeds and Liverpool Canal* v. *Hustler* (a). [*Parke* B. Certainly; and language of that description is here found in 58 *Geo.* 3. *Alderson* B. Suppose a road to lead to a ford, and through the ford to the other side, and from thence further on, if the county built a bridge and repaired 300 feet of the road on each side, you contend that *Bussey* v. *Storey* would not apply, and that the trustees could not take toll in respect of those parts of the road.] In *Bussey* v. *Storey* the trustees were not as in this case prohibited from repairing the part of the road in question. [*Parke* B. The question is, whether the act 9 *Geo.* 4. operates to take that part of the road which is now in *Birmingham* (viz. between *Five Ways* and *Easy Row*) altogether out of the jurisdiction of the trustees, so as no longer to form part of the old road, or whether it merely exonerates them from obligation to repair that part. *Alderson* B. If the part in question is no longer parcel of the old road, but is part of *Birmingham*, the plaintiff did not go over 100 yards of the *said*, viz. the old *Hagley* road (b).] Toll thorough exists at common law by prescription; and as such, requires consideration, viz. a benefit corresponding with

(a) 1 B. & Cr. 425.
(b) See 3 *G.* 4. c. 126. s. 32., general turnpike act.

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the burden. Then how can toll be claimed for this portion of the road? Turnpike toll is a statutable toll thorough. The legislature did not grant the whole toll for less than the repair of the whole road. The principle of exempting those from toll who do not travel more than 100 yards on the road, is, that the party is taken not to have had the benefit of it, and de minimis non curat lex. [*Bolland* B. The *Hagley* trustees were burdened with debt in respect of this very portion of road. *Gurney* B. Permanent public benefit arose from the purchase of land for widening the road between the termini in question. *Parke* B. That is strong to show that the legislature did not by 9 *Geo.* 4. intend to withdraw this spot from the trustees appointed by 58 *Geo.* 3. *Bolland* B. A traveller entering *Birmingham* from the *Hagley* road pays road toll only, though a resident in *Birmingham* leaving that place pays the paving rate also. *Alderson* B. The prohibitory clause in the act 9 *Geo.* 4. might mean that the trustees should not interfere with the particular mode of repair by pitching and flagging, provided by that act.]

Guest for the defendant. It is assumed for the plaintiff that the repair of the road is the consideration for the tolls; but they are held to be merely a fund in aid of the original obligation to repair imposed on the districts in which the roads lie. In *Bussey* v. *Storey* (*a*) *Parke J.* says, "It is a mistake to suppose, as was urged in argument, that the object of this and other turnpike acts is to relieve parishes and townships from the burden of repairing the highways. Their object is to improve the roads for the general benefit of the public, by imposing a pecuniary tax in addition to the means already provided by law for that purpose. The obligation to maintain all public roads, with the exception of those which are to be repaired ratione tenuræ or

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had been leased out by the trustees, and that 7000*l.* was due on the credit of the tolls. Then the legislature never could have contemplated the taking away any part of the security of those persons who had advanced money in the manner made legal by 58 *G.* 3. upon the security of the whole tolls of the turnpike-road. The lessees of the tolls would be liable to actions by every person of whom they had taken tolls, if they were thus abolished by 9 *Geo.* 4. Had it been meant to repeal 58 *Geo.* 3. pro tanto, language clearly denoting that intention would have been used; and it would not have been left to follow as a remote and improbable consequence from an obscure clause in a local act, of which the trustees and parties interested had no notice. The maxim, leges posteriores priores abrogant, must be cautiously applied. *Viner*, in his Abridgment, tit. *Statutes* (*a*), says of it, "This is a true rule; but repeals by implication are things disfavoured by the law; never allowed of but where the repugnancy is plain and unavoidable, for these repeals carry along with them a tacit reflection on the legislature, that they should ignorantly and without knowing it make one act repugnant to and inconsistent with another." But these statutes are not repugnant. The inhabitants of the town have, by their own act, and for their own purposes, taken on themselves the repairs of a certain part of the road situate within the *Hagley* trust, to which the trustees would otherwise be liable, but that would not divest them of their previous right to toll.

PARKE B.—I am of opinion that the defendant is entitled to our judgment. This is an action brought by the plaintiff to recover money paid by him under a sort of duress for toll, and the question is, whether he

(*a*) (E. 6.) pl. 132.

is liable to pay it or not? and I am of opinion that he is. The first act to be considered is that of the 58 *Geo.* 3. which repeals former acts, consolidates their provisions, and imposes tolls as an auxiliary fund for keeping the road in repair. Under that act the trustees were empowered in unambiguous language to place a toll-gate at the *Five Ways*, and to collect toll there from parties passing more than a hundred yards along the road; so that the plaintiff not being within any exemption, was bound to pay tolls for travelling over that road. The whole question then arises on the effect of the subsequent *Birmingham* improvement act 9 *Geo.* 4. That statute also repeals some prior acts, and re-enacts their provisions. A section of it provides "that it shall not be lawful for the trustees of any turnpike-road to repair any part of such road which shall lie or be situated within the said town of *Birmingham*, but that so much and such part of every turnpike-road as shall be situate within the said town shall be from thenceforth made and maintained by the said commissioners." If by that clause it was intended not only to impose on the *Birmingham* improvement commissioners the burden of repairing that portion of the *Hagley* turnpike-road, but to withdraw it from the jurisdiction of the trustees appointed under 58 *Geo.* 3., then undoubtedly the plaintiff is entitled to our judgment, as he would not have passed over 100 yards of the turnpike-road. But looking at the context of the *Birmingham* improvement act 9 *Geo.* 4., it appears to me that we cannot consider the intention of the legislature to have been to withdraw this portion of the road from the jurisdiction of the *Hagley* trustees for any but the particular purpose of repairs. The object of the previous clauses of the act seems to have been, that the several streets of *Birmingham* should be paved and the footways made on one plan, with which the road trustees

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were to be prevented from interfering. The road trustees were therefore prohibited from repairing this part of the road placed under their jurisdiction by 58 *Geo.* 3., in order to prevent their interfering with the plan adopted by the *Birmingham* street commissioners for that purpose. Being thus enabled to put a limited construction on the clause, we are bound to do so, as a contrary construction would seriously injure the persons who advanced their money on the security of the tolls. The case precisely resembles that of *Pope* v. *Langworthy* (a), which it was attempted to distinguish from *Bussey* v. *Storey* (b) on a ground very similar to that taken on behalf of the present plaintiff. On the authority of both these cases, and for the reasons I have given, I am of opinion that the particular part of the road in question continued within the jurisdiction of the trustees for the purpose of taking tolls, and that the defendant is entitled to judgment.

BOLLAND B.—I should have contented myself with concurring with the judgment just delivered, had not the public importance of the case prompted me to state the grounds of my opinion. The act 9 *Geo.* 4. does not in distinct terms repeal any part of 58 *Geo.* 3., by which tolls are or may be imposed by the turnpike trustees; but seeks to exempt from their jurisdiction a particular part of the road. Looking however at the act 9 *Geo.* 4., and at the benefit derived by the town of *Birmingham* from the power they have obtained to pave this road, which is now a street, as they please, and in a way suitable to a town, by adhering to one uniform plan under one board of management, enough appears to explain the intention of excluding the interference of the turnpike trustees. Nor is it inconsistent with that enactment that the tolls

(a) 5 B. & Adol. 466. (b) 4 B. & Adol. 98.

imposed by 58 *Geo.* 3. should continue to be paid; for great expense has been incurred in the widening and improving this very part of the road, from which the town of *Birmingham* and the public reap advantage equivalent to the tolls.

ALDERSON B.—I am of the same opinion, and think that the construction of section 33 of the 9 *Geo.* 4. should be limited in the manner stated. By 58 *Geo.* 3. the toll was imposed on the plaintiff by express and clear words; for the three-quarters of a mile in question, though within the town of *Birmingham*, was under that act part of the *Hagley* turnpike-road. Then is there any thing in the subsequent act which interferes with the distinct words by which the toll is imposed on the public by the first act? For the exemption here claimed by the plaintiff is not as an inhabitant of *Birmingham*, but on behalf of the public at large. Now no part of the public contributes to the repairs of this part of the road, except such as are passengers with horses &c., for a hundred yards along the *Hagley* turnpike-road. Then did the act 9 *Geo.* 4. intend to exempt the public at large from contribution to these tolls? Upon that question I agree with my brother *Parke* that that act took away from the turnpike trustees the power of interfering with the particular mode of repair which might be adopted by the *Birmingham* commissioners on the spot in question, in order that there might not be two clashing jurisdictions, and that the repairs might be executed on a uniform system. Then the case falls within *Bussey* v. *Storey* and *Pope* v. *Langworthy*, where it was held that a mere exoneration of trustees from liability to repair portions of a road would not prevent them from being considered parts of the road for the purposes of collecting toll.

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GURNEY B.—Had it been intended that that part of the *Hagley* road which is now within the town of *Birmingham* should no longer continue part of that road for any purpose, it would have been so expressly enacted, and not left to the inference now attempted to be raised. But the answer to such inference is afforded by considering that this part of the road had been widened and improved with money lent on the security of the tolls imposed under the *Hagley* act, and that the construction contended for would deprive the lenders of a great part of that security.

Judgment for the defendant.

The Company of Proprietors of the MONMOUTHSHIRE CANAL COMPANY *against* HARFORD and Others.

Trespass for breaking and entering 'one close called the *Rail-road*, and one other close formerly used as a rail-road,' on the 1st *January*, 1830, and on divers other days and times, and for tearing up the roads and converting the materials.

TRESPASS for breaking and entering, on 1st *January* 1830, and on divers days and times, two closes of the plaintiff, to wit, one close called the *Rail-*

The third plea was, that the closes in which &c., were made and maintained by the plaintiffs as part of a railway under a local act, and were and are used as a part of such railway under that act; and that plaintiffs were possessed of the closes in which &c., without having taken from the owners of the fee any conveyance of the freehold interest therein. That several persons named were seised in their demesne as of fee in the closes next adjoining the closes in which &c., on either side; that those adjoining closes contained valuable minerals, which could only be conveniently carried by means of a rail-road across the locus in quo. The plea then justified the trespasses as committed by the defendants as servants of the owners of the fee, for the purpose of carrying minerals dug on one side of the rail-road to the other, by means of another rail-road, and for the necessary and more convenient use and occupation of the said closes for the said purposes. Replication, de injuriâ absque residuo causæ, having first protested the seisin of the alleged owners in fee.

The 14th plea stated, that for twenty years next before the commencement of the suit, the occupiers of the closes adjoining the locus in quo had *of right and without interruption* used and been accustomed to use the privilege and easement of passing

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road, and the other close abutting &c.; and which said last-mentioned close was formerly used as a rail-road or railway, and damaging the earth and soil of the said closes respectively, and tearing up the roads &c., and converting and disposing of the materials. Second count, de bonis asportatis.

Pleas: first, not guilty. Secondly, liberum tenementum. Thirdly, that the closes in which &c. were and are certain closes made and maintained by the plaintiffs as part of a railway, under the provisions of a certain act of parliament made in *32 Geo. 3.*, for making and maintaining a navigable cut or canal from &c., and a collateral cut or canal from &c., and for making and maintaining railways or stone roads from such cuts or canals to several iron-works or mines in the counties of *Monmouth* or *Brecknock*, and that the said closes in which &c., then and there formed and were a part and used as such railway

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and repassing &c., and the laying down rail-roads across the plaintiffs' rail-road. The replication to the third plea traversed the user as of right and without interruption. New assignment, that the trespasses were committed with other and different purposes &c. Judgment by default thereon.

The particulars of the plaintiffs' demand were for trespasses committed by the defendants in *April* and *May* 1830, in "a close which now is or heretofore was a rail or tram-road," and destroying the plates of the same, and putting down others. It was proved that in *February* 1829, the defendants took up some of the plates of the plaintiffs' rail-road, and diverted the course of a part, carrying it in a new line over their own ground, and then made a rail-road crossing the site of the old and also the new rail-road:—Held, that the particulars pointed to the old rail-road, and were sufficient.

On the third issue the plaintiffs gave evidence to prove that in constructing the cross rail-road the defendants had in view an ulterior object, and not merely the necessary and convenient occupation of their closes on either side the locus in quo (the plaintiffs' rail-road.) The defendants called witnesses to prove the contrary. The judge directed the jury that the question was, whether the cross rail-road was made bonâ fide for the more necessary and convenient occupation of the defendants' closes, or for some ulterior object? Held, that he was right.

On the 14th issue, whether the defendants had for twenty years as of right, and without interruption, used and enjoyed the easement of passing across the locus in quo (the plaintiffs' rail-road) in the manner stated in the plea:—Held, that the defendants were bound to show an uninterrupted enjoyment as of right during that period, and that the plaintiffs might prove the defendants' applications to them during the twenty years for leave to cross their rail-road, without specially replying such licence so granted under the eighth section of 3 & 4 *Will.* 4. c. 71.

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under and by virtue of the said act of parliament, and of certain other acts of parliament &c. (for extending the road) and for and at the said times when &c., the plaintiffs were in possession of the said several closes in which &c., without having at any time obtained or taken from the person or persons who were or are thereof seised as of fee, or otherwise entitled thereto, any conveyance of the freehold estate or interest of such person or persons: and the said defendants say, that before the several times when &c., certain persons, to wit, *Richard Summers Harford*, *John Harford*, and *William Weaver Davis*, were and still are seised in their demesne as of fee, of and in certain, to wit, 20 closes, next adjoining the said closes in which &c., on one side &c., and 20 other closes next adjoining &c., on the other side; and that before and at the time of the passing of the said acts of parliament, and before and at the said several times &c., when &c., the said closes so adjoining &c. were closes containing large quantities of minerals of a valuable nature, and were chiefly valuable on that account; and the owners and occupiers thereof were and are in the habit of digging and obtaining therefrom divers large quantities of minerals, and that it was and is usual and proper in that part of the country where the said several closes were and are situate, to carry and convey such minerals in tram-carts, and in and along the tram-road constructed for that pupose; and that the same could not conveniently and properly be carried or conveyed in any other manner, nor could such closes so respectively adjoining be otherwise conveniently occupied; and thereupon before and at &c., it became and was necessary, reasonable, and proper that the said *R. S. H.*, *J. H.*, and *W. W. D.*, should make and erect certain tram-roads across the said closes in which &c., in different parts thereof, for the purposes of carrying and conveying from their said closes on one side thereof to their

said closes on the other side thereof, minerals dug and gained by them from such their said closes; and for the necessary and more convenient occupation and use of their said several closes respectively for the said purposes; wherefore the said defendants, as servants and by the command of the said *R. S. H.*, *J. H.*, and *W. W. D.* at &c., for the purpose of making the said tram-roads across the said closes in which &c., broke and entered &c., and made across the same such tram-roads for the purposes aforesaid, from the said closes of the said *R. S. H.*, *J. H.*, and *W. W. D.*, on one side of the said closes in which &c., to their said closes on the other side thereof. And the defendants, as such servants and by such command, at the said times when &c., used the said tram-roads so by them made, in carrying and conveying in tram-carts from and to such respective closes of the said *R. S. H.*, *J. H.*, and *W. W. D.*, divers minerals their property, and by them dug and gained from such the said closes respectively; and in so doing, the said defendants, at the said times when &c., necessarily and unavoidably, with feet in walking, a little trod down, trampled upon, consumed, and spoiled the grass of the plaintiffs' growing on their said closes in which &c., and tore up, subverted, damaged, and spoiled the earth and soil of the said closes in which &c., and tore up, prostrated, and destroyed a small part of the said roads and paths of the plaintiffs, and the materials thereof coming, to wit, the said iron, earth, and rubbish, in the first count mentioned in that behalf, and the said goods and chattels in the second count seized, took, and carried to a small and convenient distance, and there left the same for the use of the plaintiffs, and also then and there cut, dug, and made, in and upon the closes in which &c., the said excavations, and the said roads and paths so alleged to have been cut, dug, and made by

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them; and the defendants, as such servants and by such command, on these occasions, and for the purposes aforesaid, also then and there necessarily put, placed, and laid, and caused to be put, placed, and laid in and upon part of the closes in which &c. the iron, stones, earth, and rubbish, in the said first count lastly mentioned, the same being materials necessary and proper for making such tram-roads so made across the closes in which &c., and there kept and continued the same from thence hitherto, as the defendants lawfully might for the cause aforesaid, doing no unnecessary damage to the said plaintiffs, and the use and enjoyment of the said closes in which &c. for the purposes of a railway under the said acts of parliament, not being thereby hindered or obstructed; verification.

The fourth, fifth, sixth, and seventh pleas were similar to the third in substance, but varied in the mode of stating the purposes for which the way was claimed. The eighth plea claimed a way similar to that claimed in the third plea, by virtue of a reservation in a grant of the locus in quo made by one *Glover* to the plaintiffs. This plea became immaterial. The ninth, tenth, and eleventh pleas resembled the eighth, claiming the way in like manner for various other purposes. The twelfth plea was of a grant of the way (by lost deed) from the plaintiffs to certain persons under whom the defendants justified. The thirteenth plea was similar, stating the way to be for the convenient occupation of the adjoining lands.

The fourteenth plea stated, that for twenty years and upwards next before the commencement of this suit, and before either of the said times when &c., the occupiers for the time being of certain, to wit, twenty closes, adjoining the closes in which &c., on one side thereof, being also the occupiers of divers, to wit, twenty other closes, adjoining to and on the other side of the close in

which &c., of right and without interruption have had and used, and have been used and accustomed to have and use, and of right during that time, and at the said times when &c., were entitled to have and use the liberty, easement, and privilege of passing and repassing across the said closes in which &c., in such parts thereof as should be necessary and convenient, from and to such respective closes, adjoining and being on each side of the closes in which &c., on foot and with horses and carts, for the purpose of carrying minerals the produce of such respective lands, and other things, from and to such respective closes so adjoining the closes in which &c., and for the more convenient use, occupation, and enjoyment of such last-mentioned closes, with liberty and power to such occupiers for the time being of such closes on one side of the closes in which &c., being also the occupiers of the said other closes on the other side of the closes in which &c., to do and perform in all the said closes in which &c., all such things as should be necessary for the purposes of enjoying and using the liberty, easement, and privilege of passing and repassing the closes in which &c. as last aforesaid, and as should not obstruct or be inconsistent with the use and enjoyment of the said closes in which &c. as a railway, under the said acts of parliament: and the defendants further say, that long before the said times when &c., the said *R. S. H.*, *J. H.*, and *W. W. D.*, were occupiers of the said last-mentioned closes, on one side of the closes in which &c., as of the said last-mentioned closes on the other side thereof. And the said defendants further say, that during the times last-mentioned, and before and at the said several times when &c., the said closes so adjoining the said several closes in which &c., were and are lands or closes containing divers large quantities of minerals of a valuable nature, and were valuable

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chiefly on that account, and the owners and occupiers thereof were in the habit of digging and obtaining therefrom divers large quantities of minerals. And the defendants further say, that it was and is usual and proper in that part of the country where the said several closes were situate, to carry and convey such minerals in tram-carts, and in and along a tram-road constructed for that purpose, and that the same could not conveniently or properly be carried or conveyed in any other manner; nor could such closes so adjoining the closes in which &c., be otherwise conveniently used or enjoyed for the purposes last aforesaid; and thereupon, before and at the said several times when &c. it became and was necessary, reasonable, and proper, and did not obstruct, and was not inconsistent with such use and enjoyment of the said closes in which &c., as a railway under the said acts of parliament, that the said *R. S. H.*, *J. H.*, and *W. W. D.*, should make and erect certain tram-roads across the said closes in which &c., in different parts thereof, for the purpose of carrying and conveying from their said close on one side thereof, to their said close on the other side thereof, minerals dug and gained by them from such their said closes respectively, and for the necessary and more convenient occupation and use of their said several closes respectively for the said last-mentioned purposes; wherefore the said defendants, as the servants and by the command of the said *R. S. H.*, *J. H.*, and *W. W. D.*, at the said several times when &c., for the purpose of making such tram-roads across the said closes in which &c., and of using the last-mentioned way, broke and entered the said closes in which &c., and then and there made across the same such tram-roads for the purposes aforesaid, from the said closes of the said *R. S. H.*, *J. H.*, and *W. W. D.*, on one side of the said closes in which &c., to their said closes

on the other side thereof; and the defendants as such servants &c. The fifteenth plea resembled the fourteenth, claiming the easement for the purpose of carrying earth &c. from the adjoining closes. The sixteenth plea stated, that for fifty years and upwards next before either of the said times when &c., the occupiers for the time being of certain, to wit, twenty closes, near the closes on which &c. on one side thereof, being also occupiers of divers, to wit, twenty other closes on the other side of the closes in which &c., of right and without interruption have had and used, and have been used and accustomed to have and use, and of right during that time, and at the said times when &c., were entitled to have and use the liberty, easement and privilege of passing and repassing across the said closes in which &c., on foot and with horses and tram-carts, for the purposes of the convenient occupation of such respective closes so being near the closes in which &c.; and for the more convenient use, occupation, and enjoyment of such last-mentioned closes, with liberty and power to such occupiers for the time being of such closes on one side of the closes in which &c., being also the occupiers of the said other closes on the other side of the closes in which &c., from time to time when necessary to make tram-roads across such parts of the closes in which &c., as should be necessary for the purposes of enjoying and using the liberty, easement, and privilege of passing and repassing across the closes in which &c., as last aforesaid, so as they should not obstruct or do any thing inconsistent with the use and enjoyment of the said closes in which &c., as a railway under the said acts of parliament; and the defendants further say, that long before and at the said times when &c., the said *R. S. H.*, *J. H.*, and *W. W. D.*, were occupiers as well of the said last-mentioned closes on one side of the closes in which &c.,

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as of the last-mentioned closes on the other side thereof, and the defendants aver, that before and at the said several times when &c. it became and was necessary, reasonable and proper that the said *R. S. H.*, *J. H.*, and *W. W. D.* should make and erect certain tram-roads across the said closes in which &c., in different parts thereof, for the purpose of using and enjoying the said last-mentioned liberty, easement, and privilege; wherefore the said defendants, as the servants and by the command of the said *R. S. H.*, *J. H.*, and *W. W. D.*, at the said several times when &c., for the purpose of making such tram-roads across the said closes in which &c., for the said purpose broke and entered the said closes in which &c. and then and there made across the same such tram-roads for the purposes last aforesaid; and the defendants as such servants &c. The 17th plea was similar to the 16th, but claiming the right for occupiers of land on one side. The 18th plea resembled the 16th, except in claiming the way to exist at the free will and pleasure of the occupiers. The remaining pleas became immaterial.

Replications to the 3d, 4th, 5th, 6th, and 7th pleas. The plaintiffs, after protesting the seisin of *R. S. H.*, *J. H.*, and *W. W. D.*, replied de injuria absque residue causa. To the 12th and 13th they replied by traversing the grant. To the 14th plea they replied as follows: that although true it is that the said *R. S. H.*, *J. H.*, and *W. W. D.* were occupiers of the said last-mentioned closes on one side of the close in which &c., as of the said last-mentioned closes on the other side thereof in manner and form as the said defendants have in their said 14th plea in that behalf above alleged, protesting nevertheless that for twenty years and upwards next before the commencement of this suit, and before either of the said times when &c., the occupiers for the time being of the said twenty closes, adjoining the closes in which &c., on

one side thereof, being also the occupiers of the said twenty other closes adjoining to and on the other side of the closes in which &c., of right and without interruption have not had and used, and have not been used and accustomed to have and use, nor of right during that time, or at the said times when &c. were entitled to have and use the liberty, easement, and privilege of passing and repassing across the said closes in which &c., in such parts thereof as should be necessary and convenient from and to such respective closes so adjoining and being on each side of the closes in which &c. on foot and with horses and carts, for the purpose of carrying minerals, the produce of such respective lands and other things from and to such respective closes so adjoining the closes in which &c. and for the more convenient use, occupation, and enjoyment of such last mentioned closes, with liberty to power to such occupiers for the time being of such closes on one side of the closes in which &c. being also the occupiers of the said other closes on the other side of the closes in which &c. to do and perform in and upon the closes in which &c. all such things as should be necessary for the purposes of enjoying and using the liberty, easement and privilege of passing and repassing across the closes in which &c., as last aforesaid, and as should not obstruct or be inconsistent with the use and enjoyment of the said closes in which &c., as a railway under the said act of parliament, in manner and form as the said defendants have in their said 15th plea in that behalf above alleged protesting also that the said closes so adjoining &c. were not closes containing minerals of a valuable nature, nor were valuable chiefly upon that account, neither were the owners and occupiers thereof in the habit of digging and obtaining therefrom minerals in manner and form as the said defendants have in their said 14th plea in that behalf above alleged

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protesting also, that it was not nor is it usual or proper in that part of the country where the said several closes were and are situate, to carry and convey such minerals in tram-carts, and in and along a tram-road constructed for the purpose, in manner and form as the said defendants have in their said 14th plea in that behalf above alleged; protesting also that the said defendants, at the said several times when &c., were not servants nor acted by the command of the said *R. S. H.*, *J. H.*, and *W. W. D.* as in that plea mentioned. For replication, nevertheless in this behalf to the said 14th plea the said plaintiffs say, that the said defendants at the said times when &c., of their own wrong, and without the residue of the cause by them in their said 14th plea alleged, committed the said several trespasses in the said declaration mentioned, in manner and form as the said plaintiffs have in their said declaration complained against them the said defendants, and this &c. Replication to the 16th plea, that for twenty years and upwards next before the times when &c. the occupiers of said twenty closes near the closes in which &c., on one side thereof, being also the occupiers of the said twenty closes on the other side &c. of right and without interruption have not had nor used, and have not been accustomed to have and use, nor of right during that time &c. were entitled to have and use the liberty, easement, &c. There were similar replications to the 17th and 18th pleas. As to the 3d, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, and 18th pleas, the plaintiffs new assigned that the trespasses were committed on other and different occasions, and for other and different purposes &c., and in a greater degree and quantity &c., and to a greater extent &c. than was necessary. To this new assignment defendants suffered judgment to go by default.

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The following were the particulars of the trespasses alleged to have been committed. This action is brought by the above-named plaintiffs to recover from the above-named defendants damages for the following trespasses, the first of which trespasses was committed by the defendants in the months of *April* and *May* 1830, by breaking and entering into or upon a certain close which is or was heretofore a rail or tram-road situate and being in the parish of *Bedwelty* in the county of *Monmouth*, running across a certain common or close there called *Penmark*, and turning up, subverting, pulling to pieces and destroying a certain part of the first-mentioned close, and the plates and other materials of the first-mentioned close, and carrying away and converting the said plates and materials to the defendants' own use, and laying down other plates, and other works in and upon the first-mentioned close, in, upon, over, and across the first-mentioned close, and making or laying down a transverse tram or railroad across and over the said last-mentioned close, and rendering it altogether unfit for use, and for other trespasses of a similar nature and description to those hereinbefore mentioned, committed by the said defendants in and upon another part of their said first-mentioned close, in or about the month of *June* last, and also for other trespasses of a similar nature or description, committed by the said defendants on the said last-mentioned part of the said close at two several times and on two separate occasions in the month of *July* last, and for continuing the said several trespasses so by the defendants committed from the respective times of committing the same hitherto.

The cause was tried before *Alderson* B. at the last *Herefordshire* assizes; it appeared that the plaintiffs, soon after their incorporation by 32 *G.* 3. (*a*) completed

(*a*) Amended 37 *G.* 3.

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their canal. The defendant *S. Harford* was managing agent of iron works called *Selhowy* estate, and the defendant *C. H. Harford* of other iron-works called *Ebber Vale*. The other defendants were workmen of the first defendant. The plaintiffs, under a clause in the act, made a railroad from their canal to the *Selhowy* works. It consisted merely of the usual iron plates laid on the ground without any fence, and intersected the *Selhowy* estate, the proprietors of which paid a large sum to the plaintiffs as tonnage for the use of it. By statute 33 *G.* 3. another canal company was established, and another canal called the *Brecon* and *Abergavenny* canal was made in the same neighbourhood. By a clause in it (called the eight-mile clause) owners or occupiers of mineral lands &c. within the distance of eight miles from such canal, might call on the company to make railways from it to such lands, and on their neglecting so to do within a certain time, might themselves make the same. In 1831, the proprietors of *Selhowy* called on the last-mentioned company to make a railway from their canal across the *Selhowy* estate to *Penmark* colliery; but before the time allowed by the act for considering the requisition had elapsed, they themselves caused a railway to be laid down in the proposed line and intersecting the plaintiffs' railway, This was done by moving several plates of the plaintiffs' railway on each side, and laying down others in their stead, so constructed as to permit crossing as well as travelling straight on the same line. In *February* 1829, the defendants, without the knowledge of plaintiffs, took up a large part of their railroad, turning its course in a new direction, in order, as they said, to work away some minerals under the old line. For this act the action was in fact brought. The *Selhowy* new railroad crossed both the old and new lines.

The plaintiffs, after proving their ownership by a

conveyance in 1795, and certain admissions, urged in answer to the pleas, that the defendants' railroad was not simply constructed for the more convenient use of their property on each side of the plaintiffs' railroad, but for the sake of opening a ready communication with the *Brecon* canal. On the issue raised on the 16th plea, they offered in evidence instances of leave asked by the defendants, within twenty years, to put down railways across that of the plaintiffs. To this evidence the defendants objected, that as it went to show their enjoyment to be only permissive, it could not be admitted on the issue, whether they had exercised the right without interruption for twenty years; but could only be adduced in support of a special replication.

The defendants contended for a nonsuit, on the ground that the trespasses sued for were not the diversion of the old railroad in 1829, but the carrying the new one across the old line in 1830, in one close only, by taking up the old tramp plates and laying down new ones. That the plaintiffs were not shown to have more than an easement in the old road, and that as the defendants were entitled to the soil and freehold of the ground on which the new road was placed, the plaintiffs could only claim an easement thereon, for which trespass would not lie. As to the pleas on which issues alleging obstruction to the plaintiffs' occupation of the old railroad were raised, they contended that no such obstruction was proved from the mere crossing it with the new railway, and showed the latter to be necessary to the advantageous occupation of the *Selhowy* estate by the defendant *Harford*, and to be bonâ fide made for the purposes stated on his behalf. The learned baron (*Alderson*) having refused to nonsuit the plaintiffs, but reserving the point, put it to the jury to decide, first, whether the plaintiffs had the soil and

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freehold of the old railroad; secondly, whether the defendants had any general right to put down crossings on the plaintiffs' old railroad where they pleased; thirdly, whether the defendants had obstructed it; and lastly, whether the defendants' acts in making the railroad were reasonable, necessary, and proper to be done for conveniently occupying the closes adjoining each side of the old railroad? adding, that if, in the opinion of the jury, the crossings of the old railroad were made for the bonâ fide occupation of those closes, as the defendants had undertaken to show, the issues in which that question was raised should be found for them; while on the other hand, if the crossings were made not for those purposes, but, as contended by the plaintiffs, for the purpose of effecting a junction with the *Brecon* canal, their verdict should be for the plaintiffs. Verdict for the plaintiffs for nominal damages on all the points.

Maule for the plaintiff, moved to enter a nonsuit, on the ground that the declaration varied from the particulars, and both from the evidence as to what was the locus in quo. The learned judge held it to be the old railroad. Now the declaration charges trespasses on "a close called the *Railroad*, and another close formerly used as a railroad," whereas the particulars refer only to "one close which is or once was a railroad," thereby meaning the new railroad, which is the only close which at the time of action brought was a railroad. But all the plaintiffs' evidence of trespass applied to the old railroad. [*Alderson* B. That step became necessary after their admission that the soil and freehold of the land on which the new railroad was placed was in the defendants.] The defendants were as much in possession of the new railroad as of any other; and as they had dug up the old line and put the plaintiffs in possession of the new one, they could not

say against the plaintiffs that they were not in possession of or entitled to the new line, because it would deny title to the close given in exchange for the site of the old railroad. [*Parke* B. You first exclude the new line altogether, as admitted to be in the defendants; and then say, they cannot be in possession of the old line because the plaintiffs have the new line in lieu of it, and must have abandoned possession of the old. Lord *Lyndhurst* C. B. What is alleged in the declaration?—A breaking and entering a close, and laying down iron there; it states trespasses on both the old and new railroad, and it need not define on which.] The particulars confine the trespasses charged to *May* 1830, viz. to breaking and entering "*a* close which *now is*, or was heretofore, a rail or tram-road," viz. taking up the old railroad and laying the new one across it: whereas those proved at the trial appear to have been committed in *February* 1829, viz. diverting the course of the old railroad. In 1830 no vestige of the old railroad remained at the spot where it had been diverted. [*Parke* B. The particulars clearly apply to the old railroad, substituting the word "close" for railroad. Lord *Lyndhurst* C. B. The terms of the particulars show that the plaintiffs did not intend to confine the trespasses charged to the new railroad, and they were made out by the evidence of trespasses to the close, which was theretofore a railroad.] The point of obstructing the railroad, though left to the jury, did not arise on any issue, except the new assignment as to which judgment was suffered by default. [*Alderson* B. The third plea stated that the acts complained of were done for the more convenient occupation of the closes, alleging no unnecessary damage done to the plaintiffs, and adding "the use and enjoyment of the said closes, in which &c. for the purposes of a railway, under the said acts, not being

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thereby hindered or obstructed." I told the jury, first, that their verdict must be for the plaintiffs, if the defendants' acts were not done for the more convenient occupation of the closes; but that if they thought they were, then their verdict must be for the defendants; in which case they would find, secondly, whether the defendants had been guilty of any obstruction. The verdict being for the plaintiffs on the first question, the last became immaterial.]

The issue joined on the sixteenth plea is, that the occupiers of the closes have not of right used, and been accustomed to use, the railroad for twenty years without interruption, for the convenient use and occupation of their closes. The plaintiffs traversed the mere user of the right by the defendants, not the right itself. Now the defendants abundantly proved that user by them for twenty years; but the plaintiffs were suffered to prove a fact which did not arise on the issue of mere user, though consistent with it, viz. that the user and enjoyment had taken place by the plaintiffs' licence. Now that should have been specially replied, 2 & 3 *W.* 4. c. 71. s. 5. (*a*)

(*a*) 2 & 3 *W.* 4. c. 71. s. 5.—"And be it further enacted, that in all actions upon the case and other pleadings, wherein the party claiming may now by law allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient, and if the same shall be denied, all and every the matters in this act mentioned and provided which shall be applicable to the case, shall be admissible in evidence to sustain or rebut the allegation; and that in all pleadings to actions of trespass, and in all other pleadings wherein before the passing of this act it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right by the occupiers of the tenement in respect whereof the same is claimed, for and during such of the periods mentioned in this act as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done; and if the other party shall intend to rely on any provision, exception, incapacity, disability, contract, agreement, or other matter hereinbefore men-

[*Parke* B. The question on this issue is, whether the occupiers of the closes have had the use and enjoyment of them for twenty years *as of right, and without interruption*. They must, therefore, show the simple fact of uninterrupted enjoyment "as of right for the full period" of twenty years. Any interruption of that enjoyment, as, for instance, enjoyment for alternate weeks only, would be evidence to disprove the plea. If leave was asked on every occasion, the enjoyment "as of right" by the occupiers is at an end, as is its continuity (*a*). In *Bright* v. *Walker* (*b*) it was held, that in order to establish a right of way within sect. 2 of 2 & 3 *W*. 4. c. 71. it must be proved that the claimant has enjoyed it for the full period of twenty years, and "as of right;" and that it may be defeated by proof of a grant or licence written or parol, for a limited period, comprising the whole or part of the twenty years. Lord *Lyndhurst* C. B. The simple fact of continuous enjoyment was to be proved on this issue. Any asking for leave by the occupiers was therefore admissible in evidence to break down the alleged continuity of their enjoyment, and repeated user under leave given for particular occasions, admits in each instance that the former licence had expired. In common reason, if continual application be made for leave to enjoy a particular thing, no room is left to presume a right to do so.]

The remaining point is, whether the learned baron directed the jury right when he left it to them to say, whether the defendants made the railroad bonâ fide for the convenient use and occupation of their closes on each side of the plaintiffs' railroad, or for an ulterior

tioned, or any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation."

(*a*) See *ante*, Vol. IV. 509. (*b*) *Ante*, Vol. IV. 502, 508, 509.

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object. [*Alderson* B. There was a mass of conflicting evidence on this part of the case, and I left it to the jury to decide whether the acts in question were done with the view taken by the witnesses on the one side, or with that taken on the other; stating the question to be, whether those acts were done with a bonâ fide view to the proper and necessary use and enjoyment of the closes, or to some ulterior object not referable to such use and enjoyment. The plaintiffs gave evidence to show that the defendants had an ulterior object beyond the mere occupation of the land, and did the acts in question in furtherance of that ulterior object.] Supposing the acts to be such as the defendants might have done for the convenient occupation of their premises, it was not a question whether they were done bonâ fide for that, or for an ulterior object. Even if it appeared that the defendants had in view an ulterior object for which to establish a right of crossing the plaintiffs' railroad, that was not an ingredient in the case for the consideration of the jury. For the whole question was, whether the defendants were justisfied in making the railroad, and not what purpose they might put it to when made. Suppose them to admit an ulterior object, their acts, otherwise legal, *would not be rendered illegal.* Thus a man may distrain for one cause and avow for any other, for which the entry was justifiable at law (*a*). *Lucas* v. *Nockells* (*b*) appears contrary to the present argument, but *Parke* J. dissented in that case. [*Alderson* B. I left it to the jury on the conflicting evidence, whether if the defendants had another object in view besides

(*a*) Comyns's Digest, tit. *Pleader* (3 K. 14.) citing *Butler* and *Baker's* case. See also 1 Lord Ray. 454. *Anon.* Godbolt, 110; Fitzherbert's Abridgment, tit. *Avowry*, pl. 232. citing Mich. 34 *Ed.* 1; 3 Rep. 26, a. 2 Leon. R. 196; *Crowther* v. *Ramsbottom*, 7 T. R. 654.

(*b*) Dom. Proc. 10 Bing. 157; 1 Clark & Finnelly, 438. See also *Governors of Bristol Poor* v. *Webb*, 1 Adol. & Ell. 264.

the mere convenient use and enjoyment of their closes, that was not evidence on the question whether their act was necessary or not to the latter purpose? *Parke* B. Would not a declaration by the defendants, that they wanted the new railroad for a communication with a distant mine, be evidence in this issue? Then, why were not their acts evidence? Their acts were tantamount to a declaration by them. If the new railroad was necessary for the proper use and enjoyment of the closes, the ulterior object would not be material. Lord *Lyndhurst*, C. B. The question was, whether the defendants' acts in making the new railroad were necessary for the convenient use, occupation, and enjoyment of the defendants' closes? If they were, though any precise ulterior object was immaterial to be proved, yet such an object would, if proved to exist, be material to show that the defendants did not require the new railroad for the occupation of their closes, but made that the colour for effecting an ulterior object. We will, however, consider whether a rule should be granted on this point.]

Cur. adv. vult.

PARKE B. afterwards delivered the judgment of the court.—In this case the court, after giving their opinion on the other grounds of the motion for a new trial, took time to consider one of the points suggested by Mr. *Maule*; viz. that the learned judge, in summing up to the jury, directed them to consider, whether the defendants bonâ fide intended the two tram-roads which crossed the railway of the plaintiffs, (and which formed the subject of the trespass complained of,) for the convenient and beneficial use of their lands *inter se*, or whether their sole object in making them was to carry into effect another and different plan, totally uncon-

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nected with such occupation? and we think that in so doing he was right, and that there ought not to be a new trial on this ground.

The issue for the jury was, in substance, whether the defendants' closes could not be conveniently occupied without making a tram-road across the plaintiffs' railway; and whether it was reasonable and proper for the defendants so to do, for the purpose of carrying the minerals across from the one close to the other. On the part of the plaintiffs, Mr. *Mushett* and Mr. *Bevan* were called as witnesses, being men well acquainted with the management of such concerns, who stated that it was by no means necessary or even advantageous to the defendants so to conduct their works. In addition to this evidence, the plaintiffs adduced the testimony of a surveyor, Mr. *Davis*, who deposed to the fact, that in 1825 he had made a survey for the defendants, for the purposes suggested by the plaintiffs, as the real and sole purpose of the defendants; and that the point where the then projected tram-road crossed the plaintiffs' railway, very nearly, if not exactly, coincided with that subsequently adopted by them in 1830, for the alleged purpose of the convenient occupation of their lands. He also stated, that negociations connected with the same ulterior object were even yet going on on the part of the defendants. There was evidence also that the tram-road in question was of larger dimensions than could properly be required for the mere occupation of the lands *inter se;* and that in another part of the works, whence much larger quantities of materials were derived, and large masses of rubbish deposited, but which was unconnected with the ulterior object, a plan nearly agreeing with that suggested by Messrs. *Mushett* and *Bevan* had been actually adopted by the defendants themselves.

It is undoubtedly true that in answer to this, a large and important body of evidence was laid before the jury by the counsel for the defendants. The two men by whom the tram-roads were laid out and made, negatived any intention of carrying into effect the supposed ulterior object of the defendants, or any orders from the defendants to that effect; and many ironmasters of high respectability and great experience also testified, that in the management of the defendants' estate, they should have adopted for its convenient occupation alone the very plan carried into effect by the defendants.

Upon this issue the bonâ fide intention of the defendants seems to us admissible for the consideration of the jury. We think that it tends to show that the making a tram-road across the plaintiffs' railway was not, in the opinion of the defendants themselves, necessary or convenient for the occupation of their closes: for it shows that their sole object was different from that stated by them in their pleas. The circumstances referred to, as demonstrative of their real intention, may be considered as equivalent to a declaration by the defendants, that in making the tram-road their sole object was to go to the *Trevill* quarry and the *Brecon* canal, and that they did not really want such tram-roads for the convenient occupation of their lands at all.

Now such a declaration would undoubtedly have been evidence on this issue against the defendants; and under the circumstances of the conflict of evidence in this case, we think this a circumstance which might properly weigh with the jury when they deliberated on their verdict.

We are also of opinion, that as the facts from which such intention was sought to be inferred, were opened by the counsel for the plaintiffs and relied on, and afterwards adduced in evidence without any objection to

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their admissibility on the part of the counsel for the defendants, and as their counsel made observations on that evidence in opening the case to the jury, and called witnesses to explain and contradict it, it does not lie in the mouth of either of the parties now to object to the effect of that evidence being commented on by the learned judge, and considered by the jury. We think, therefore, that there should be no rule in this case.

Rule refused.

WAITE, Clerk, *against* BISHOP, LAWRENCE, BROOKE, and NOKES.

Assignees of an insolvent incumbent, who have published a sequestration, are not entitled to receive arrears of composition for tithes due before such publication; for that writ only operates prospectively from the time of such publication.

The property of an incumbent in the profits of his living is not bound from the time of lodging the *levari facias* in the bishop's registry.

ON an application to the court, under s. 1. of 1 & 2 *W.* 4. c. 58. (the interpleader act), the facts were directed to be stated in the following special case:—The plaintiff in this case is rector of *Blagdon* in the county of *Somerset*, and in 1825 granted an annuity to one *Britten*, of *Clapham Common* in the county of *Surrey*, and secured the payment thereof by a demise of his rectory of *B.* aforesaid, and by warrant-of-attorney, entitled in a cause, *Britten* v. *Waite*. In 1828 the annuity being in arrear, *Britten* applied for and obtained sequestration against the rectory aforesaid, and continued in receipt of the tithes and profits thereof till *March* 1832. On 8th *May* 1832 the plaintiff *Waite* applied to the Court of King's Bench, through *Nokes* an attorney, for, and obtained, a rule nisi for setting aside and delivering up the annuity deeds, warrants-of-attorney and judgments.

In *Trinity* term 1832 that rule was made absolute, and it was ordered that no further proceedings should

be taken on the writ of sequestration; and there was a reference to the master respecting the monies received by *Britten*, with liberty thereafter to issue a fresh writ of sequestration for any future arrears of the said annuity.

Britten refused to withdraw his writ of sequestration from the plaintiff's living, alleging that the said rule absolute did not order him to do so. In *April* 1832, before the application to the Court of King's Bench for the rule *nisi* abovementioned, the plaintiff executed a warrant-of-attorney to the said *Nokes* in the penal sum of 100*l.* for certain costs due from the plaintiff to *Nokes;* on which warrant-of-attorney *Nokes* signed judgment, and issued a writ of levari facias, according to the forms prescribed by law, and caused the same to be filed in the office of the Lord Bishop of *Bath and Wells*, on or about the 26th *April* 1832, for the purpose of procuring sequestration against the living of *Blagdon* aforesaid, the sequestration of the said *John Britten* being still upon the said living.

In the month of *June* 1832, after the above rule was made absolute, the plaintiff executed a second warrant-of-attorney to the said *Nokes*, in the penal sum of 200*l.*, for other costs due from the plaintiff to the said *Nokes*, upon which second warrant-of-attorney the said *Nokes* likewise signed judgment, and issued a writ of levari facias, according to the forms prescribed by law; and caused the same to be filed in the office of the said Lord Bishop of *Bath and Wells*, on or about the 18th day of *June* 1832, for the purpose of procuring sequestration against the said living of *Blagdon* aforesaid, the sequestration of the said *Britten* being still upon the said living.

The said *Nokes* caused an office copy of the said rule absolute, of *Trinity* term 1832, to be served upon Mr. *Parfitt*, the registrar of the Bishop of *Bath and Wells*,

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by Messrs. *Melliar, Lovell,* & Co., solicitors, of *Wells;* when the said Mr. *Parfitt* informed them that sequestration could not be granted to the said *Nokes,* in consequence of the said *Britten* not having withdrawn his writ of sequestration from the said living.

The plaintiff having been arrested for debt, filed his petition on the 10th of *October* 1832, to be discharged from his debts by virtue of the act of parliament passed for the relief of insolvent debtors; and, on the 23d *February* 1833, the plaintiff was discharged accordingly, having inserted in his schedule the debt claimed by the said *Britten,* and likewise the debt claimed by the said *Nokes,* by virtue of the said two warrants-of-attorney and writs of levari facias issued upon the judgments entered up thereon. The above-named defendants, *William Bishop, Joseph Lawrence,* and *Charles Brooke,* were duly appointed assignees of the estate and effects of the above plaintiff.

On the 14th *May* 1833, (being after the adjudication of the plaintiff), the master of the Court of King's Bench made his *allocatur* upon the matters referred to him, in the following words and figures:—

	£.	s.	d.
Amount of tithes received	909	19	5½
Payments thereout	873	7	2
Balance in the hands of the sequestrator towards payment of the arrears of the annuity	£36	12	3½

On the 24th *May* 1833, the Court of King's Bench granted to the said *Britten* a rule nisi, to show cause why he should not be at liberty to proceed on his writ of sequestration.

The assignees of the plaintiff took no steps to oppose the said rule, whereupon the plaintiff himself (*Waite*) instructed counsel, through his attorney, to oppose it,

on the ground, that, by the rule of court of *Trinity* term 1832, the said *Britten* was reduced to the condition of a mere judgment creditor; and the plaintiff *Waite* having been adjudicated to be discharged before *Britten* could issue a fresh writ of sequestration, that his claim against the living was destroyed by virtue of the 34th sect. of 7 *Geo.* 4. c. 57. The same rule coming on for argument on the 12th of *June* 1833, the Court of King's Bench, on consideration of the facts stated there, relating to Mr. *Britten*'s sequestration, discharged the said rule.

On the 14th of *May* 1833, the assignees of the plaintiff filed an order of adjudication in the office of the Lord Bishop of *Bath and Wells*, pursuant to the directions of the insolvent debtors' act (*a*), but could not obtain sequestration, in consequence of *Britten*'s still refusing to withdraw his writ of sequestration.

On the 13th *November* 1833, the assignees of the plaintiff obtained from the Court of King's Bench a rule to show cause why the sequestration, at the suit of the plaintiff (*Britten*), should not be set aside, or removed from the benefice, the plaintiff retaining all monies lawfully levied thereunder, and with liberty to the assignees under the insolvent debtors' act to issue a sequestration upon such living.

Mr. *Nokes*'s opposition to the rule, as regarded the permission of the court to the assignees to issue a sequestration, was not persisted in, it having been proposed by the assignees of the plaintiff *Waite*, that the claims of the said *Nokes* should be satisfied out of the first proceeds from the living; and that the details of this arrangement should be settled between the counsel for the parties.

The rule came on for argument on the 22d of *November* 1833, when the court ordered that the seques-

(*a*) 7 Geo. 4. c. 57. s. 28.

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tration at the suit of the plaintiff *Britten* should be removed from the benefice of the defendant, the plaintiff retaining all monies lawfully levied thereunder; and with liberty to the assignees under the insolvent debtors' act to issue a sequestration upon the said living.

On the 8th *January* 1834, the said *Britten* withdrew his writ of sequestration; and, on the 12th *January* 1834, that of the assignees of the plaintiff was duly published. From the month of *May* 1832 to the said 12th *January* 1834 no creditor of the said plaintiff could receive the proceeds from the said living, *Britten*, the then sequestrator, being restrained by the order of the Court of King's Bench, and the Bishop of *Bath and Wells* being prevented from granting sequestration to any other creditor, in consequence of the writ of the said *Britten* being still on the said living. The plaintiff having been advised that he was, by virtue of the provision contained in 7 *Geo.* 4. c. 57. s. 28., the only party entitled to the tithes of the said living accrued due from the month of *March* 1832 to the said 29th *September* 1833, claimed the same as they respectively became due in the months of *March* and *September* 1833. A great number of the parishioners having refused payment to the plaintiff, several actions were brought at his suit in *Trinity* vacation last in this honourable court, and, amongst others, against *T. Roworth*, *J. Bailey* the elder, and *J. Stevens*. The tithes being claimed by several parties, the last-named defendants took out a summons under the interpleader act, 1 & 2 *Will.* 4. c. 58., which being attended by all parties interested, before Mr. Baron *Bayley*, he ordered that the amounts sued for should be paid into court, and all further proceedings stayed until the fourth day of the following term.

In *Hilary* term 1834 the matter was brought before this honourable court, when the above-named

plaintiff, and the defendants *W. Bishop*, *J. Lawrence*, *C. Brooke*, and *J. Nokes* appeared and stated their respective claims to the tithes in question. The said *W. Bishop*, *J. Lawrence*, and *C. Brooke* founded their right upon their appointment as assignees of the above-named plaintiff, and upon the sequestration then granted to them by the bishop of the diocese. The said *J. Nokes* alleged in his behalf, as the fact really was, as stated by Mr. *Parfitt* (the registrar of the Lord Bishop of *Bath and Wells*), that the sequestration had been granted to the said assignees, subject to any right he the said *Nokes* might have to the tithes in question; and claimed to have such right from the circumstance, that having lodged his writs of levari facias in the office of the bishop of the diocese, he had done all that the law enabled him to do; that sequestration would have been granted to him had not the said *Britten* been in possession of the said living by virtue of his said writ of sequestration, and that such possession was tortious, and a violation of the rule of *Trinity* term 1832, made in the cause of *Britten* v. *Waite*. The plaintiff *Waite* claimed the tithes on the grounds hereinbefore stated. The orders of court respecting the argument in the several causes &c. were then set forth.

Sir *John Campbell* (Attorney-General) for the plaintiff. The question for the opinion of the court is, which of the three following parties is entitled to the arrears of tithes; the plaintiff as incumbent, three of the defendants as his assignees under the insolvent act, or the remaining defendant (*Nokes*) as his judgment creditor. The material dates are as follows: 23d *February* 1833, when the plaintiff was discharged by order of the insolvent court; *March* and *September* 1833, when the arrears in question became due; *Trinity* va-

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cation 1833, when the plaintiff brought his actions for tithes; and 12th *January* 1834, when the sequestration of the assignees was published. As the plaintiff has primâ facie a right as incumbent to maintain his action against the occupiers, and recover the arrears from them, title must be shown against him by the present claimants.

First, as to the title of the judgment creditor *Nokes*. [*Parke* B. Is it not a question whether the prior sequestration of *Britten* did not prevent the plaintiff from bringing his action, by making him receive the profits for the benefit of *Britten?*] *Britten* does not appear; and if he had, the decision of the King's Bench in *Britten* v. *Waite* (*a*) shows that his sequestration of 1828 could not be further enforced than for the arrears of the annuity granted by the plaintiff, and secured upon his benefice, which had then become due; nor has *Britten* issued any fresh sequestration for subsequent arrears, as he might have done. [*Alderson* B. It may be that the interpleader act excludes those who neglect to make their claim. Lord *Lyndhurst* C. B. *Britten* was allowed by the rule of the Court of King's Bench of 22d *November* 1833 to retain so much of the monies as he had at that time lawfully recovered under his sequestration. He was left at liberty to issue a fresh one for subsequent arrears, but did not do so, and afterwards withdrew his original sequestration. The arrears now in question are therefore not affected. *Parke* B. *Britten* is not before this court, and if he was, he could not avail himself of his sequestration as to the arrears now in question, viz. those accruing between *March* 1832 and 29th *September* 1833. He, therefore, is out of the case; the execution creditor (*Nokes*) is also out of the case; for though he lodged his writs of levari facias

(*a*) 3 Bar. & Ad. 915.

with the bishop, he never obtained, much less did he ever publish a sequestration.] Whether he has any remedy against the bishop for not granting a sequestration, on the supposition that *Britten*'s then possession of the benefice under his prior sequestration was tortious, is not now the question; but without such sequestration he cannot make title to the arrears in question as against the plaintiff, the incumbent.

As to the title of the plaintiff's assignees under the insolvent act, they can have no claim to these arrears under the general assignment, for they were not due at that date. The plaintiff's actions were commenced before 12th *January* 1834, when the sequestration of the assignees was published. *Bishop* v. *Hatch* (*a*) shows that no property in the arrears could pass to them, without such sequestration obtained according to the provisions of the insolvent act 7 *Geo.* 4. c. 57. s. 28. (*b*). The court here called on

(*a*) 1 Adol. & Ell. 171.

(*b*) That clause does not remove a doubt as to the stage of a sequestration at which the property would vest in the insolvent's assignees. It is as follows:—

"Provided always, that nothing in this act contained shall extend to entitle the assignee or assignees of the estate and effects of any such prisoner, being a beneficed clergyman or curate, to the income of such benefice or curacy for the purposes of this act. Provided always, nevertheless, that it shall be lawful for such assignee or assignees to apply for and obtain a sequestration of the profit of any such benefice for the payment of the debts of such prisoner, and the order of adjudication made in the matter of such prisoner's petition, in pursuance of this act, shall be a sufficient warrant for the granting of such sequestration, without any writ or other proceedings to authorize the same; and such sequestration shall accordingly be issued as the same might have been issued upon any writ of levari facias founded upon any judgment against such prisoner."

In *Doe* v. *Black*, 3 Camp. 447. a notice by an incumbent to his tenant to quit his glebe expired on 25th *December*. On the next 17th *January*, a sequestration was published in the church: it was held that the tenant was a trespasser between 25th *December* and 15th *January*, and that the rector might bring ejectment, laying the demise on 1st *January*. *Dampier* J.

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Harrison for the assignees. Had *Britten's* sequestration been removed from the benefice by the rule of *Trinity* 1832, the subsequent rule obtained by the assignees in *November* 1833, would have been unnecessary to compel him to withdraw it. It therefore de facto existed at the time when the plaintiff brought his actions, and was considered so to exist by the bishop, who on that account refused to grant another sequestration to the assignees. Its existence in that state till 8th *January* 1834, when it was withdrawn, is sufficient to defeat the plaintiff's title. Supposing

added, "The incumbent is not entitled to the rents and profits of the glebe lands from the day of publication while the sequestration remains in force, but he is entitled to them from the expiration of the notice to quit." In *Bennett* v. *Apperley*, 6 B. & C. 634, 9 D. & R. 676, Lord *Tenterden* says, that the whole extent of the decision in *Doe* v. *Bluck* is, that till publication no person's rights can be interfered with, viz. that the right of the rector to hold possession of the land and take the profits, is not determined; so that he might be entitled to bring ejectment on a right of entry accruing to him before publication, the demise being laid accordingly, though he could not have a writ of possession after it, *ibid.* *Bayley* J. added, that the property was bound from the time when the sequestrator is appointed, and that the publication of notice is only necessary in order to give priority against conflicting rights. (*Legassicke* v. *Bishop of Exeter*, 1 Crompt. Prac. 359., mentioned in *Marsh* v. *Fawcett*, 2 H. Bla. 582. had been cited.) Till 29 *Car.* 2. c. 3. s. 16. enacted that "no writ of fieri facias or other execution" should bind property, but from the time of its delivery to the sheriff, the property was bound from the teste of a writ of fi. fa. at suit of a common person; see the judgment of *Patteson* J. in *Giles* v. *Grover*, 9 Bing. 135. Since that act, if after such delivery the defendant assigns his goods, the sheriff may take them in execution; per *Littledale* J. *Lucas* v. *Nockells*, Dom. Proc. 10 Bing. 182. See the judgments of *Alderson* J. and of *Taunton* J. and *Littledale* J. in *Giles* v. *Grover*, Dom. Proc. 6 Bing. 158. 176. 238. In *Payne* v. *Drewe*, 4 East, 523, collecting all the previous cases, Lord *Ellenborough* laid down the rule to be, that the goods are bound by the delivery of the writ to the sheriff, as against the party himself and all claiming by assignment from, or representation through or under him. In 9 Bing. 265, *Tindal* C. J. says that this may be true, without the consequence contended for, that the property in the goods is in any manner altered thereby. See also Bull. N. P. 91, *Lowthal* v. *Tomkins*, *Rex* v. *Allnut*, 16 East, 278.

however that its operation was at an end, and that the tithes were the plaintiff's down to the 12th *January* 1834, when the assignees' sequestration was published, who were at that time entitled to the arrears? The assignees; for the plaintiff had not received them, and if they belonged to him, his title to them was transferred to the assignees. The execution creditor could not take them, having never issued a sequestration; nor could *Britten* do so without a second sequestration. [Lord *Lyndhurst* C. B. Suppose a sequestration de facto to exist, though it should not have continued in operation, should not any second sequestration be published? *Parke* B. You say the assignees' sequestration operates not only on tithes afterwards to become due, but on the arrears unpaid at the time of its publication, and that you might have pleaded specially, that since the commencement of the suit the superior title of the assignees had interposed to defeat the plaintiff's title.] Great injustice would be done if they are held not entitled to the arrears of the profits, for 120*l.* the curate's arrears of salary, may be claimed under their sequestration.

Addison for the execution creditor. *Nokes*, by lodging his writs at the bishop's registry, and directing sequestrations to be issued thereon, did all that he was required by law to do in order to perfect his title to the arrears of tithe, and is now entitled to receive them. He has at all events priority to the sequestration of the assignees, which was granted expressly subject to his claim. But this is a question for the equity of the court. [Lord *Lyndhurst* C. B. The real question is, whether *Nokes* could maintain an action for the arrears?] As against the plaintiff, he might. For when his last writ was lodged at the bishop's registry in *June* 1832, *Britten*'s sequestration remained upon the living, and in

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operation; it was afterwards set aside, and the arrears now in question accrued in the meantime. Now it is laid down in *The King* v. *The Bishop of London* (a), that a sequestration is analogous to a fieri facias. Then, by analogy to the rule, that if two writs of fi. fa. are delivered to a sheriff to be executed, and the first is set aside after a levy under it, that levy is applicable to the second writ, *Nokes*'s writs of levari facias, as lodged in the registry, created a lien in his favour on those arrears, which could not be taken under *Britten*'s sequestration after it was set aside; for *Bennett* v. *Apperley* (b) shows it was not necessary that the sequestration should be published after the return day of the levari facias. Though it has been said that the sequestration will bind third persons only from the time of the publishing it, it is not so determined as to defendants themselves. As to them, the property is bound from the time of delivering the writ to the bishop. Sequestrations might now be published on *Nokes*'s writs, notwithstanding those of the assignees; for *Nokes*'s title is paramount to theirs.

The *Attorney-General* in reply. Since *Britten*'s sequestration was set aside his title is out of the present question. As to *Nokes*, no authority is cited to prove that he acquired a lien on the property, or that it was bound by the lodging the writs with the bishop. It is only by 29 *Car.* 2. c. 3. s. 16., that the lodging a fi. fa. with the sheriff binds the property in the goods in that particular case. [Lord *Lyndhurst* C. B. The King's Bench never held *Britten*'s sequestration void, they merely ordered it first not to be proceeded on, and afterwards to be removed.] Nor is any authority cited to show that the plaintiff's right to sue for these arrears of

(a) 1 D. & Ryl. 487. (b) 6 B. & Cr. 630.

tithes could be transferred by the assignment, contrary to principle and to the words of the writ. [*Parke* B. Supposing no composition for tithes to have existed in this case, and no tithes to have been set out, the incumbent's right of action on the statute 6 *Edw.* 6. would not have been transferred.] Then why should it be transferred in another form of action?

Lord LYNDHURST C. B.—As *Britten* has been served with this rule, and does not appear to claim, I agree with my brother *Parke* that his title may be considered as entirely out of the question. Then it is unnecessary to consider any title which he might be supposed to have. The plaintiff, as rector, has the primâ facie and apparent right to these arrears, by virtue of his incumbency. As the assignees' title did not arise till the 12th *January*, when their sequestration was published, it cannot defeat the plaintiff's title to these arrears, unless it had a retrospective effect applicable to by-gone compositions. I am of opinion that it has no such effect. The form of the writ (*a*) shows that to give it retrospective effect would be contrary to its terms, which apply only to the accruing profits of the

(*a*) Being in form as follows: "We therefore, proceeding by virtue of and in obedience to the said writ, and inasmuch as in us lies, duly executing the same, having sequestrated all and singular the tithes, fruits, profits, oblations, obventions, and other ecclesiastical rights and emoluments of and belonging to the rectory [or vicarage] and parish church of in the county of , and diocese of , of which the said mentioned in the said writ is the present rector, [or vicar] and by these presents do sequester the same, and give and grant unto you the said , full power and authority to sequester, collect, levy, gather, and receive all and singular the tithes, fruits, profits, oblations, obventions, and all other ecclesiastical rights and emoluments belonging to the rectory [or vicarage] and parish church of aforesaid, and the same to sell and dispose of, and the money arising therefrom to apply to and for the due payment of the debt and costs in the said writ mentioned, subject to the said indorsement on the said writ, also subject &c."

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rectory. *Nokes* can have no claim, for no sequestration of his has been published.

PARKE B.—I am of the same opinion. *Britten's* non-appearance has reduced this question to the single claim of the assignees, whose title to these compositions for tithes depends on this, whether their sequestration had a retrospective effect or not? I am of opinion that it had not, and that neither debts previously due to the rector for rent, nor his rights of action for these arrears of tithes, or in like manner for not setting out tithes, pass under it. Nothing but the future profits of the rectory can pass by it.

ALDERSON B.—The plaintiff was in possession as rector at the time these arrears accrued, and is therefore entitled to them. The sequestration of the assignees does not cover antecedent profits which did not belong to the rectory at that time. Were we to hold otherwise we might endanger other and prior sequestrations. Such may perhaps exist, directed against these very arrears.

The learned baron also said that *Britten*, if served with the rule, was barred by section 3. of the interpleader act, but that his not being served would make no difference, as he would have a right of action against the defendants.

GURNEY B. concurred.

Judgment for plaintiff, with costs of the application to be paid to him by the assignees and the execution creditor in equal moieties. The defendants to pay the plaintiff's costs of the action to the time of paying money into court; subsequent costs, if any, to be paid by the assignees.

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COCKER *against* HANNAH COWPER.

The permanent easement of having a drain in another's land to convey water from a spring there situate, cannot be conferred without deed, and a parol licence to have such a drain may be revoked though it was made in consequence.

CASE. The declaration stated that the plaintiff was possessed of a brewery and premises, and that by reason thereof he was entitled to the benefit of certain water arising or flowing in or from a certain well or spring of water in a certain close of the defendant, and which water ought to have run and flowed along a certain drain to the plaintiff's brewery; but that the defendant prevented the plaintiff from using the same. Plea, not guilty, pleaded before the new rules of pleading of *Hil.* 4 *Will.* 4. came into operation. At the *Lent* assizes for *Lancashire,* before *Gurney* B., a verdict was taken for the plaintiff by consent, subject to the opinion of this court on a special case to be stated by a barrister. It was stated by him accordingly as follows:—"I do award and find, that from the year 1799, up to and beyond the year 1815, the public-house, brewhouse, and premises, now held by the plaintiff and mentioned in the declaration, were occupied by one *Paul Cowper,* under a lease thereof for 999 years, granted to him in 1799 by the then owner in fee, one *John Cowper,* the brother of the said *Paul Cowper;* and that the plaintiff's well, also mentioned in the declaration, was made by the said *Paul Cowper* long before 1815, and was originally supplied with water conveyed from an under-ground spring by a covered drain through the adjoining close of one *Dunkerley;* and that in 1815, *Dunkerley* prevented the water from running any longer from his said close to the said well, in consequence whereof the said *Paul Cowper,* in order to obtain another supply of water for his said well, in the same year made a drain and cut a deep tunnel into and through a close mentioned in the declaration as

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the close of the defendant, which was part of the estate of the above-mentioned *John Cowper*, and is now in the occupation of the defendant and her two daughters, *Betty* and *Sarah Cowper*. By those means an underground spring was found in the said close, by which the well was supplied with water through the said drain or tunnel till *May* 1833. The said drain and tunnel were made by *Paul Cowper* at an expense of about 15*l.*, with the verbal consent of *Benjamin Cowper*, who was the brother of *Paul Cowper*, and was tenant of the said close from 1796 to 1830. The verbal consent of the defendant was also obtained at the time when the drain and tunnel were made. In the year 1815, the above-mentioned *John Cowper* was not living. He died seised in fee of the said close in 1809 intestate, leaving the defendant his widow, *Joseph* his eldest son and heir-at-law, and several other children, surviving him. *Joseph* died in *March* 1814, a minor and intestate; *William*, the second son of *John Cowper*, was heir of *Joseph*, was eleven years old in 1815, and died intestate in 1824, a minor. *Henry*, third son of *John*, was heir of *William Cowper*, and died in 1827, a minor and intestate. The other surviving children of *John Cowper* were *Betty* and *Sarah*, who are still living. From the death of *John Cowper* in 1809 till 1831, the defendant his widow has ever lived with the children or such as survived as head of the family, but not on the estate of the said *John Cowper*, and has received the rents of that estate as the head of that family from the death of *John Cowper* till 1830, and in *May* 1831 the defendant and the said *Betty* and *Sarah* went to reside on the said close. In *May* 1833, the said *Betty Cowper* applied to Mr. *Lees*, the landlord of the plaintiff, for a remuneration for the supply of water issuing from the close above-mentioned, and on his refusal to make any, *Betty Cowper* in the same month ordered

the drain and tunnel to be stopped up, so that the water should not run down them, which was done with the knowledge and approval of the defendant. A guardian of the infant children of *John Cowper* was not appointed by any deed or testamentary disposition of *John Cowper*, nor in any other way except by operation of law. Defendant, as widow of *John Cowper*, was entitled to dower in her husband's estates, but it has never been assigned to her." The arbitrator then assessed the plaintiff's damages at 50*l.*, if the decision of the court should be in his favour.

Alexander for the plaintiff. The proper party is sued. The plaintiff or *Lees* have the interest of *Paul Cowper*. The facts found by the arbitrator amount to a licence to him, from the owner in fee simple of the close, to make the drain in 1815; that having been acted on by him accordingly at some expense, cannot be revoked, though not made by deed; *Winter* v. *Brockwell* (a), *Taylor* v. *Waters* (b), *Liggins* v. *Inge* (c), *Mason* v. *Hill* (d). [*Parke* B. To support this point you must deny the authority of *Hewlins* v. *Shippam* (e), which was very well considered; and does not interfere with *Winter* v. *Brockwell*, where the parol licence was to put a skylight over the defendant's own area, nor with *Liggins* v. *Inge*, where the licence was to lower a bank on the land of the party licensed.]

Secondly, the facts show the plaintiff to have a right to the water flowing down the drain, his predecessor *Paul Cowper* having been the first person who found the spring and first appropriated it to a beneficial use, continuing such appropriation from 1815 to 1833, a period of eighteen years. Though this water first

(a) 8 East, 308.
(b) 7 Taunt. 384; S. C. 2 Marsh. 551.
(c) 7 Bing. 682.
(d) 5 B. & Adol. 1.
(e) 5 B. & Cr. 221; 7 D. & R. 783, S. C.

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arose in the close of the defendant, that would not prevent the plaintiff from first appropriating it as it flowed through his own lands, or justify the defendant in diverting it after such appropriation. *Bealey v. Shaw* (a).

PARKE B.—It is quite impossible to contend that a man can obtain a title by entering the close of another, tapping a spring there, and conveying the water away to his own premises by a drain. A claim to the use of water so obtained might be supported by proof of actual enjoyment without interruption for 20 years (b), but in this case the original appropriation was only made in 1815, and the doctrine of appropriation has been much cut down in *Mason* v. *Hill* (c). On the other point, the whole of the plaintiff's case had its origin in a licence which is void; for *Hewlins* v. *Shippam* shows decisively that an easement like the present can only be conferred by deed (d). It has been shown that the plaintiff has acquired no other title to the water.

ALDERSON B.—The plaintiff's predecessor did not merely appropriate water passing over his land originally, but caused it to flow in that of the defendant's.

BOLLAND and GURNEY Bs. concurred.

Verdict to be entered for the defendant.

(a) 6 East, 207, as cited by *Tindal* C. J. 7 Bing. 693, and by *Denman* C. J. in 5 B. & Adol. 19. See *Williams* v. *Morland*, 2 B. & C. 910; *Canham* v. *Fiske*, *ante*, Vol. II. 155.

(b) See 2 & 3 *Will.* 4. c. 71. s. 2.; *ante*, Vol. IV. 507, 508.

(c) See 5 B. & Adol. 16. *et seq.*

(d) See *Bryan* v. *Whistler*, 8 B. & C. 288.

Wightman was to have argued the following points for the defendant:—1st. That a mere parol licence, if given by a person competent to do so, is not sufficient to confer a permanent easement. 2dly. That this licence was not given by a competent person. And 3dly. That the stoppage of the drain and tunnel was not by the defendant.

PENNY, surviving partner of BROOKES, *against* INNES.

A bill of exchange was indorsed specially to the plaintiffs by the payee. Next after the special indorsement, and before any indorsement by the plaintiffs, the defendant indorsed it. Lastly followed the plaintiff's indorsement: Held, that the defendant's indorsement operated, not as a transfer of the property in the original bill, but as a new drawing by the defendant, who became thereupon liable to an action on the bill at suit of the plaintiff, without any necessity for a fresh stamp.

ASSUMPSIT by the indorsee of a bill of exchange, charging the defendant in some counts as indorser, in others as drawer. The first count stated that *W. Wilson* made his bill of exchange, and thereby requested *H. Wilson* & Co., at twelve months after date, to pay to his order the sum of 200*l.* It then stated an indorsement by *W. W.* to the defendant, and an indorsement by the defendant to plaintiff and *Brookes*. The second count was similar, but omitted to state any indorsement by *W. W.* The third count stated that the defendant drew the bill on *H. Wilson* & Co., payable to his own order, and indorsed it to the plaintiff and *Brookes*. The fourth count alleged that the defendant drew the bill on *H. Wilson* & Co., payable to the order of *W. W.*, who indorsed it to the plaintiff and *Brookes*. The fifth count stated that *W. W.* drew the bill on the same drawees, payable to his own order, and indorsed it to the plaintiff and *Brookes*, who delivered it to the defendant, who then and there indorsed and delivered it to the plaintiff and *Brookes*. Count for goods sold and delivered, and money counts. Plea: non assumpsit (*a*). The cause

(*a*) The action was commenced before the new rules of pleading, *Reg. Gen. Hil.* 4 *Will.* 4. No. 2. Rule 2. came into operation.

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was tried before *Parke* B. at the *London* sittings after last *Trinity* term, and the following bill was produced:

"£200 9th *September* 1829.

"Twelve months after date pay to me or my order the sum of 200*l.* for value received.

William Wilson."

Messrs. *Henry Wilson* & Co.
Pedlar's Acre, Lambeth. (Indorsed)
"Pay Messrs. *Brookes* & *Penny* or order,
William Wilson."
"*John Rose Innes* (defendant.)
Brookes and *Penny.*"

It was then proved that the defendant had indorsed the bill after the special indorsement by the payee *W. Wilson* to the plaintiff and *Brookes*, and before the latter had indorsed it. It was thereupon contended that an indorsement thus prematurely made could not give the plaintiff and his deceased partner a title to sue the defendant on the bill; but the learned baron was of opinion that such indorsement was in fact a new drawing. The consideration for the indorsement by the defendant was not disputed. The plaintiff had a verdict for the amount of the bill.

Platt moved to set aside the verdict and enter a nonsuit, or for a new trial. On the view of the bill and indorsement, the first indorsement was that of *W. Wilson*, specially indorsing to the plaintiff and *Brookes*. The first question is, whether the defendant, by writing his name on the bill next after that special indorsement, and before the indorsement by those indorsees, rendered himself liable as a new drawer? and if he did, was not a fresh stamp necessary? Had the bill passed through the hands of the plaintiff and *Brookes*

to the defendant *Innes* by indorsement, and been by him indorsed again to them, they could not have sued him as indorsee, because he in his turn might have sued them as such, which would produce circuity of action. The defendant is a stranger to the bill, and has no property in it. In order to have that, he must have a remedy against the acceptor. Then he cannot be made thus liable as drawer, by writing his name on the bill.

Lord LYNDHURST C. B.—The defendant, by indorsing this bill, gave it the effect of a new instrument, though he did not in fact create such a new instrument as would require a fresh stamp. The bill became the property of the plaintiff and *Brookes* by special indorsement; and the moment they had possession of it they held it in the same way as if the indorsement to them had been in blank and general. While it remained in their possession, they might strike out their own indorsement and hand it to the defendant, for it was their own property. Whether the indorsement was general or special, made no difference, and no other person could be prejudiced. The indorsement to them being struck out, the bill would have stood as indorsed in blank to the defendant.

PARKE B.—It struck me at the trial that the holder of this bill had a right to treat it as a new one. It is part of the properties inherent in the original instrument, that every indorsement of it shall operate against the indorser as a new drawing by him (*a*). But it does

(*a*) In *Ballingalls* v. *Gloster*, 3 East, 481. 4 Esp. N. P. C. 268. *S. C.* the court said, that it had been long ago decided that every indorsee was a new drawer, so as to be immediately liable as such on non-acceptance by drawee. See *Smallwood* v. *Vernon*, 1 Stra. 479; *Hodges* v. *Steward*, 1 Salk. 215; *Hall* v. *Lewis*, *id.* 132; *Skinner and Macarty* v. *Barrow*, cited 3 Wils. 16; *Heylin* v. *Adamson*, 2 Burr. 674; *Gibson* v. *Minet*, 1 H. Bl. 587.

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not become a fresh instrument so as to require a fresh stamp. The defendant might be liable to be sued on the bill, though at the time he indorsed it he had no property in it; for suppose a man to steal a bill, and indorse it for value, can it be doubted that he might be charged as drawer? The defendant's indorsement in this case was equivalent to drawing a new bill, which new bill it was intended to transfer to the plaintiff and *Brookes*. As to the rule against circuity of action, it is not applicable upon these facts; for the defendant never was indorsee of the plaintiff and *Brookes*, nor was it ever intended by the indorsement to convey the title in the former bill to him. Then he had no power to transfer that title. It depends on the intention with which a name is put on a bill, whether the order of indorsements on it signifies or not.

ALDERSON B.—The indorsement by the defendant operated as against himself as a good and valid indorsement, though he himself had no title (*a*). Such indorsement would give a title against himself as a fresh drawer, without any operation as to the other parties to the bill.

GURNEY B. concurred.

Rule refused.

(*a*) See Bayley on Bills, 4th ed. 106.

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BASTABLE *against* POOLE.

ASSUMPSIT for money had and received. Plea, non-assumpsit. The cause was tried before *Bolland* B. at the last sittings at *Guildhall*. One *Harvey* was called for the plaintiff to prove the following facts. The plaintiff was a wine-merchant in the city of *London*, and the defendant a bill-broker there. The plaintiff, in order to raise money, drew a bill for 65*l.* 10*s.* payable to his own order, and procured the acceptance to it of his friend *Terry*. The bill was indorsed by the plaintiff and handed over to *Harvey*, the plaintiff's late partner, to get it discounted. *Harvey* took it to the defendant, and applied to him to discount it, saying, "it was *Bastable*'s bill, and that he (*Harvey*) had no interest in it." Being desired to leave it, and call the next day, he did so; and defendant agreed to "do" it, if *Harvey* would indorse. *Harvey* told the defendant that he (*Harvey*) had no interest in the bill, but that if his indorsement would facilitate its being cashed, he would indorse it, and did so accordingly. Defendant then paid him 10*l.* on account, and afterwards 10*l.* more, but never paid the rest. He then discounted it with one *Gomersall*. When it became due the holder called on the plaintiff as drawer, who took it up, and now sued the defendant for the balance, 45*l.* 10*s.* On *Harvey*'s cross-examination it was elicited that in other transactions of discounting bills with the defendant, he had been in the habit of indorsing the bills which the defendant

The plaintiff being drawer and payee of a bill of exchange handed it to *H.* to get discounted. *H.* offered it for that purpose to the defendant, stating that it was not his, but the plaintiff's bill. Defendant refused to discount it unless indorsed by *H.* *H.* said that he had no interest in it, but to facilitate its being cashed he would indorse it. He did indorse it; upon which defendant took the bill, paid *H.* only a part of its amount, and got it discounted by one *G.* The plaintiff was obliged to take it up at its maturity, and sued the defendant on it for the balance unpaid to *H.* A verdict for defendant was set aside as against the evidence, and a new trial was awarded to try the question whether the plaintiff was in reality the owner of the bill at the time it was indorsed, and not whether or not he had at that time been represented to be so by *H.*

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discounted, and that the defendant owed him 40*l.* on the balance of other bill transactions. On behalf of the defendant it was contended, that the credit was given not to the plaintiff, but *Harvey;* and that his course of dealing with the defendant in other transactions was to be weighed against his testimony, that on this occasion he said the bill was *Bastable*'s. No evidence was adduced for the defendant. The learned baron, after summing up these facts, said, the finding of the jury must depend on the credit they gave to *Harvey*'s statement, that this transaction with the defendant was on a different footing from former dealings of a like nature. That the question was, whether he indorsed the bill for the purpose of making himself liable to the defendant? For if he did, and the defendant discounted it on that understanding, the defendant was entitled to a verdict; but that if *Harvey* did not indorse the bill with that object, and the defendant did not take the bill on his credit, the verdict should be for the plaintiff. The jury found a verdict for the defendant, and

J. Jervis obtained a rule for a new trial, on the grounds, first, that the judge had misdirected the jury, and next, that the verdict was against the evidence.

Butt showed cause. The learned baron, in substance, called on the jury to say whether they believed that this dealing by *Harvey* with the defendant was on the footing of his former transactions with him, or whether they believed, that in this single instance, *Harvey* acted as a mere agent for the plaintiff, and told the defendant so at the time. Then the judge was right in directing the jury to decide the case as they gave credit to *Harvey*'s testimony or not. Nor can the ver-

dict be said to be against the weight of evidence; for though *Harvey* was not contradicted by any other witness, he admitted that in his previous transactions of discounting other bills with the defendant, he and the defendant only were debtor and creditor, and that the drawers of those bills had nothing to do with the defendant. He gave no reason for his having excepted this transaction from his general course of dealing with the defendant. Then the verdict, which proceeded on a disbelief that it was so excepted, and on a belief that the defendant gave that credit to *Harvey*'s indorsement, is not contrary to, but supported by the only evidence in the cause.

J. Jervis in support of the rule, was stopped by the court.

PARKE B.—The Court is of opinion that this rule ought to be made absolute for a new trial without costs. The defendant *Poole* had received a bill, the property of the plaintiff *Bastable*, from *Harvey*, to whom the latter had delivered it to get it discounted. *Harvey* indorsed it, and *Poole* undertook to discount it; but, without paying the whole value for it, transferred it to another hand for his own purposes, and received the whole balance of the bill. When the bill arrived at maturity, it was returned to and taken up by the plaintiff *Bastable*, who then brought this action against *Poole*, alleging himself to be owner of the bill. If he was such owner, he is entitled to recover the balance of the proceeds received by the defendant. Even if before the actual discount *Harvey* had represented to *Poole* that he (*Harvey*) was the owner of the bill, the right of the plaintiff to recover as its real owner would not be affected, unless *Poole*'s position was changed by that representation. The plaintiff would not lose

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his remedy against *Poole*, though the latter would, as against the plaintiff, be entitled to any defence which he would have had against *Harvey* if he had indorsed to him. *Poole* had a right to a settlement with *Harvey*, but if *Harvey* had a right of action against him, that mere right to a settlement with him would not afford a defence. But he had not paid or settled with *Harvey*; and having no defence against him as the supposed owner of the bill, he could have none against the plaintiff *Bastable*, its real owner. That falls within the general rule, that in all cases where an agent is dealt with by a party who thinks him to be a principal, the principal may at any time declare himself subject to the equities raised by his agent. If he had settled with the agent *Harvey*, *Bastable* as principal could not have sued. The summing up does not appear satisfactorily directed to the ascertaining whether or no the bill, at the time of its discount by the defendant *Poole*, was or was not the property of the plaintiff *Bastable*; that will be the question to be decided on the new trial.

BOLLAND B.—I concur in opinion that there should be a new trial; for I entertain a different view of the case from that which I took at nisi prius. The learned baron recapitulated the facts, and proceeded:—" I told the jury that if they believed that *Harvey* had put his name on the bill in order to afford more facility to *Poole* to discount it; and if *Poole* believed it to be not *Harvey*'s but *Bastable*'s bill, *Bastable* was entitled to recover; but that if *Harvey* had handed over the bill to *Poole* without saying any thing about its being *Bastable*'s, *Harvey* could not, by setting up a property in the bill in another person, give the latter a right of action against *Poole*. I thought *Harvey* entitled to

credit, and told the jury so; but added, that if they thought the bill was discounted on his credit, and in such a way as made him liable to *Poole*, their verdict should be for the defendant.

ALDERSON B.—This rule should be made absolute with costs. I agree with my brother *Parke* in thinking that the true question for the jury was, whether they believed *Harvey*'s account, that he told *Poole* that the bill was not his (*Harvey*'s) but *Bastable*'s. Had the agent (*Harvey*) sued *Poole*, it is admitted that the state of the account between them precluded any defence by *Poole*; if so, it excluded any defence by him against *Bastable*, *Harvey*'s principal, and the real owner of the bill. The previous transactions between *Harvey* and *Poole* in discounting other bills should not have been taken into consideration by the jury.

GURNEY B.—The single question for the jury was, whether this bill was the property of the plaintiff *Bastable*. That has not been distinctly left to them. The present verdict is against the evidence, which shows that the defendant *Poole* had no defence in an action by *Harvey*; and if so, could have none in an action by his principal *Bastable*.

Rule absolute for a new trial, without costs.

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The following agreement was held to show sufficient consideration moving from the plaintiff by way of detriment to him in giving up the security of the debtor *C.* for 150*l.* at the defendant's request.

"I undertake on behalf of Mr. *P.* (the plaintiff) in consideration of Mr. *D.* (the defendant) having this day given me an undertaking to procure Mr. *W.*'s check or note in favour of Mr. *P.* for 150*l.* on account of a debt due from Mr. *C.* to Mr. *P.*, that Mr. *C.* shall *have credit* for that sum in his accounts with Mr. *P.*, and that Mr. *W.* shall *stand in the place* of Mr. *P.* to that amount; and I further undertake that Mr. *P.* shall not personally dispute Mr. *W.*'s right to deduct that sum from the accounts owing by the colliers of the *B. P.* colliery to Mr. *C.*" The declaration alleged *D.*, (the defendant's) promise to be in consideration of that of *P.* the plaintiff, by way of mutual promise:—Held good, and that it was sufficient to aver that plaintiff was ready and willing to perform his part.

A plea that the promise and undertaking mentioned in the declaration was made on a *Sunday* need not conclude *contra formam statuti*, (29 *C.* 2. c. 7.)

An attorney is not within the 29 *C.* 2. c. 7.; and if he were, an attorney who on a *Sunday* entered into an agreement to settle his client's affairs, by which he incurred personal responsibility, would not be "exercising his ordinary calling" within that act.

Where a stamped paper containing one agreement refers to another unstamped paper, so that the two papers in fact form only one agreement, the latter is admissible in evidence without a stamp.

ASSUMPSIT. The declaration stated, that whereas one *R. Chambers*, before and at the time of the making of the promises and undertakings by the defendant after-mentioned, was indebted to the plaintiff in a large sum of money, to wit, the sum of 200*l.* and thereupon, to wit, in consideration that the plaintiff, at the request of the defendant, would undertake that the said *R. Chambers* should have credit for the sum of 150*l.* in his accounts with the said plaintiff, and that one *T. E. Ward* should stand in the place of the plaintiff to that amount, and that the plaintiff should not personally dispute the said *T. E. Ward's* right to deduct that sum from the amount owing by the colliers of the *Black Park* colliery to the said *R. Chambers*, the defendant undertook that the said *T. E. Ward* would execute a promissory note to the plaintiff for the said sum of 150*l.* on account of the said debt due from the said *R. Chambers* to the said plaintiff; and the plaintiff averred, that afterwards, to wit, on &c. he was ready and willing, and offered that the said *R. Chambers* should have credit for the sum of 150*l.* with

him the plaintiff, and that the said *T. E. Ward* should stand in the place of him the plaintiff to that amount, and that he the plaintiff would not personally dispute the said *T. E. Ward*'s right to deduct that sum from the accounts owing by the colliers of the *Black Park* colliery to the said *R. Chambers*, and then requested the said *T. E. Ward* to execute a promissory note to the plaintiff, then shown and tendered to the said *T. E. Ward* for his signature, for the said sum of 150*l.*; of all which premises the defendant, to wit, on &c., had notice. Breach, that the said *T. E. Ward* did not nor would, when he was so requested, or at any time whatsoever, execute a promissory note to the plaintiff for the said sum of 150*l.* on account of the said debt so due from the said *R. Chambers* to the said plaintiff, but wholly refused and neglected so to do; and so the plaintiff saith that the defendant hath not performed his said promise and undertaking, but that the same hath been broken and not performed, to the plaintiff's damage of 300*l.* Pleas: first, the general issue; 2dly, a plea alleging fraud, &c. which was not proved; and 3dly, that before and at the time of the making the promise and undertaking of the defendant in the declaration mentioned, the defendant was and still is an attorney of the court of our lord the now king before the king himself; and before and at the time of making the said promise and undertaking of the defendant, he had been and was employed by the said *T. E. Ward* in his the defendant's ordinary calling of a legal agent, and in the way of his business as such attorney, to negotiate with the plaintiff, on behalf of the said *T. E. Ward*, certain matters, to wit, the said matters in the second plea hereinbefore mentioned (save and except the fraudulent concealment therein mentioned): And the said defendant further says, that the said promise

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and undertaking in the declaration mentioned was made and entered into by the defendant on the Lord's day, commonly called *Sunday*, to wit, on *Sunday* the 16th day of *March* 1834, and that the same was made and entered into by the defendant as the attorney and legal agent of the said *T. E. Ward*, in the exercise of the worldly labour, business, or work of the ordinary calling of the defendant as such attorney and agent; and that the same was not a work of necessity or charity; wherefore the defendant says, that the said promise and undertaking in the declaration mentioned was and is void in law; and this defendant is ready to verify &c. Demurrer to this plea, and joinder in demurrer.

At the last *Shropshire* assizes before *Alderson* B., the following undertaking, signed by the defendant and properly stamped, was produced by the plaintiff in support of the issues in fact:—"In consideration of Mr. *Hayward*'s undertaking on behalf of Mr. *Edw. Peate* of *Measbury*, I undertake that Mr. *T. E. Ward* shall execute a promissory note to the said *E. Peate* for the sum of 150*l.* on account of a debt due from *R. Chambers* of *Chirk* bank, to the said *E. Peate*. Dated the 15th day of *March* 1834.—*George Dicken.*"

The plaintiff then offered in evidence the undertaking of *Hayward* (referred to in the defendant's undertaking), and after hearing an objection that in order to be admissible in evidence it required a stamp, the learned baron received it.

Mr. *Hayward*'s undertaking was as follows:—"I undertake on behalf of Mr. *Peate* (in consideration of Mr. *Dicken* having this day given me an undertaking to procure Mr. *Ward's* check or note in favour of Mr. *Peate* for 150*l.* on account of a debt due from Mr. *Chambers* to Mr. *Peate*,) that Mr. *Chambers* shall have

credit for that sum in his accounts with Mr. *Peate*, and that Mr. *Ward* shall stand in the place of Mr. *Peate* to that amount; and I further undertake that Mr. *Peate* shall not personally dispute Mr. *Ward's* right to deduct that sum from the accounts owing by the colliers of the *Black Park* colliery to Mr. *Chambers*. (Signed) *John Hayward, Oswestry*, 15 *March* 1834." Verdict for the plaintiff on the general issue.

Justice moved for a new trial. The instruments are separate, and required a separate stamp. The unstamped agreement did not form part of the stamped agreement, but was only referred to in it. Had the defendant sued *Hayward* on the former, he must have stamped it, *Doe* v. *Hore* (*a*), *Waddington* v. *Francis* (*b*), *Robson* v. *Hall* (*c*). The *Court* took time to consider whether a rule should be granted.

Lord LYNDHURST C. B. on a subsequent day delivered their opinion.—We are of opinion that the evidence in question was properly received. It consisted of two distinct papers, one referring to the other, and one only being impressed with an agreement stamp. In substance the two formed but one agreement; and we think the case falls within that clause of the stamp act, 55 *Geo.* 3. c. 184. (*d*), which provides that where divers letters shall be offered in evidence to prove any agreement between the parties who shall have written them, it shall be sufficient if one of them shall be stamped with a duty of 1*l.* 15*s.* We therefore refuse the rule.

(*a*) 2 Esp. 724. (*b*) 5 Esp. 182.

(*c*) Peake C. N. P. 128.

(*d*) Schedule, Part I. tit. Agreement. See *Stead* v. *Liddard*, 1 Bing. 196; *Richards* v. *Franco*, *Westminster* sittings *May* 1829, cor. Lord *Tenterden*, Chitty on Stamps, 19; *Heming* v. *Perry*, 2 M. & P. 575.

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The demurrer was afterwards argued.

R. V. Richards for the plaintiff, in support of the demurrer. The plea is bad, first, because it does not conclude *contra formam statuti*. Had the action been brought on the statute for penalties, this would have been a necessary averment, *Wells* v. *Iggulden* (*a*), *Lee* v. *Clarke* (*b*), *Clanricarde* (Earl) v. *Stokes* (*c*), *Rex* v. *Southerton* (*d*); and there is no valid distinction between the cases. Secondly, because it nowhere discloses that the plaintiff had notice that the defendant's agreement with *Ward* was made on a *Sunday;* and, thirdly, because an attorney is not included in 29 *C.* 2. c. 7. [Lord *Lyndhurst* C. B. Can the defendant's act of making himself liable to pay money, *e. g.* by signing a promissory note on a *Sunday* as a security for another, be part of his "ordinary calling" as an agent within 29 *Car.* 2.?] *Richards* mentioned *Begbie* v. *Levy* (*e*). [*Parke* B. We know it is not part of the ordinary business of an attorney to enter into guarantees, or of an agent to make himself personally responsible for his principal.] The *Court* here called on

Justice to support the plea. In proceedings where it is sought to recover a penalty for an infringement of an act, the offence must be laid in the declaration to have been committed *contra formam statuti;* but it has never been held, that in order to take advantage of the provisions of a statute in a plea, as for instance, in a plea of usury, it is necessary to make such an allegation. [The Court relieved him from further arguing this point. He then argued the second objection, upon which however the Court gave no opinion, deciding the case on the last point.]

(*a*) 3 B. & Cr. 126. (*b*) 2 East, 333. (*c*) 7 East, 516.
(*d*) 6 East, 126. (*e*) *Ante*, Vol. I. 130.

The last question is, whether this defendant, an attorney, is within the act *29 C. 2. c. 7.*; and if he is whether he was acting in his "ordinary calling" when he entered into the agreement in question? That statute enacts, (s. 1.) "that all and every person and persons whatsoever shall on every Lord's day apply themselves to the observation of the same, by exercising themselves therein in the duties of piety and true religion publicly and privately; and that no *tradesman, artificer, workman, labourer, or other person whatsoever,* shall do or exercise any worldly labour, *business or work of their ordinary callings,* upon the Lord's day, or any part thereof, works of necessity and charity only excepted." In *Smith* v. *Sparrow* (*a*), the court of *Common Pleas* adopted the opinion of the court of *King's Bench* in *Fennell* v. *Ridler* (*b*), that this act should receive a liberal construction, because it is in affirmance of the religion which is the basis of the law of the country. The calling of an attorney comes within the spirit of the act. The last plea refers to the second, which shows that the transaction out of which this agreement arose, was precisely that which falls within the "ordinary calling" of an attorney or legal agent. For both parties acted for their respective clients, depending on a subsequent ratification by them.

[Lord *Lyndhurst* C. B. Even supposing that an attorney has ever been held to fall within this act, the personal engagement into which this defendant has entered, is clearly something beyond the ordinary calling of an attorney or legal agent. The words, "other person or persons" in this act, have been held

(*a*) 4 Bing. 84.

(*b*) 5 B. & Cr. 406. In *Ex parte Middleton*, 3 B. & Cr. 164, the court of *King's Bench* expressed the same opinion as to 3 C. 1. c. 1. which is in pari materiâ.

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not to include stage-coach proprietors or drivers (*a*). The plea cannot be sustained. *Alderson* B. It is not part of the ordinary calling of an attorney to pay a client's debts out of his own pocket. *Parke* B. The spirit of the act must be drawn from the ordinary rule adopted in construing it. In *Sandiman* v. *Breach* (*b*), it was held, that the words "other person or persons" can only mean persons *ejusdem generis* with those before specially enumerated (*c*).]

Justice then objected to the declaration, on the ground that it showed no valid consideration of benefit to the defendant or detriment to the plaintiff, so as to entitle the plaintiff to maintain the action. *Chambers* owed the plaintiff 200*l.*, and the consideration as alleged was, that in consideration that the plaintiff would undertake that *Chambers* should *have credit*

(*a*) *Sandiman* v. *Breach*, 7 B. & Cr. 96, though a driver of a stage van is held to be "a carrier" within 3 *C.* 1. c. 1. *Ex parte Middleton*, 3 B. & Cr. 164. (*b*) 7 B. & Cr. 96.

(*c*) Only the labour, business, or work done in the course of a man's ordinary calling is prohibited by 29 *C.* 2. c. 7; *Drury* v. *Desfontaines*, 1 Taunt. 131, recognized in *Bloxsome* v. *Williams*, 3 B. & Cr. 232, and *Fennell* v. *Ridler*, 5 B. & Cr. 506. Thus a contract for a year made between a farmer and a labourer on a *Sunday*, is a valid hiring so as to confer a settlement, *Rex* v. *Whitnash*, 7 B. & Cr. 596. The fact that a bill was drawn on a *Sunday* does not avoid it in an action by an indorsee against the acceptor, where it did not appear that the contract was completed by any acceptance taking place on that day, *Begbie* v. *Levy*, 1 Tyr. R. 130. 1 C. & P. 180, *S. C.* A sale of goods on a *Sunday* is good, if not made in the exercise of the ordinary calling of the vendor or his agent, *Drury* v. *Desfontaines*: and though it was held in *Fennell* v. *Ridler*, 5 B. & Cr. 406, that a horsedealer cannot maintain an action on a private contract made on a *Sunday* for the sale and warranty of a horse, the previous case of *Bloxsome* v. *Williams*, 3 B. & Cr. 232, which decided that a horse-dealer could not in an action for breach of warranty, set up as a defence, that he was a horsedealer and sold the horse on a *Sunday*, was distinguished by the court, who said that very distinct grounds were there stated to show that the statute did not apply; for the sale was substantially not on the *Sunday* but on a *Tuesday*. And see *Saunderson* v. *Jackson*, 2 B. & P. 238.

with *Ward* for 150*l.* in his account with the plaintiff, and that *Ward* should *stand in the place of the plaintiff* to that amount, and that the plaintiff should not personally dispute *Ward*'s right to deduct that sum of 150*l.* from the accounts owing to *Chambers*, by the colliers of the *Black Park* colliery, the defendant undertook that *Ward* should sign a promissory note to the plaintiff for 150*l.* on account of the said debt due to the plaintiff from *Chambers*. That was an agreement by the plaintiff to transfer *Chambers*'s debt to *Ward*, without alleging that either of those parties consented to be placed in the situation of debtor and creditor to each other. But without consent of all parties the agreement was nudum pactum. *Ward* could not have sued *Chambers*, but the plaintiff might still have sued him; and the rule against assigning choses in action would prevent *Ward* from standing in the place of the plaintiff, so as to take by assignment from him the debt due to him from *Chambers*; *Wilson* v. *Coupland* (*a*). The intermediate debt from *Chambers* to the plaintiff, instead of being extinguished to the extent of 150*l.* as *Wharton* v. *Walker* (*b*) shows should be done, appears from the declaration to be still subsisting. [Lord *Lyndhurst* C. B. What the plaintiff stipulates to do is, to give up his claim on *Chambers* for 150*l.* That is to his own detriment, by losing the security of *Chambers* to that extent. Then is it not a good consideration?] Not unless *Ward* and *Chambers* had consented, without which consent the plaintiff might still sue *Chambers*. [*Parke* B. It would have been a breach of his promise if he had. In *Wharton* v. *Walker* there was no priority; there was nothing but an order from the landlord to his tenant to pay to another person, to which the tenant did not, as may be said, attend.] It is no where averred that

(*a*) 5 B. & Ald. 228. (*b*) 4 B. & Cr. 163.

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the plaintiff had performed the stipulations of the agreement.

Lord LYNDHURST C. B.—What the plaintiff agreed for with the defendant is this, that he the plaintiff will give *Chambers* credit for 150*l.* in consideration of the defendant's agreeing that *Ward* shall give the plaintiff a promissory note; besides which, the plaintiff stipulated that *Ward* should stand in his place. It amounts to this, that the plaintiff undertook not to assign a chose in action, but to do every thing necessary to carry the agreement into effect, by procuring an assignment of a chose in action. That undertaking furnishes a good consideration for the defendant's promise, for what the plaintiff stipulates for, viz. the giving up 150*l.* of the debt owing to him from *Chambers*, is a detriment to himself (*a*). Nor is it any answer to say that he might break that stipulation: and though he might still have sued *Chambers* till the consent of all the parties to the transfer had been obtained, he would have been liable to the other party for a breach of his agreement, if he had done so. The allegation that the plaintiff was ready and willing, and offered that *Chambers* should have credit for 150*l.* with the plaintiff, and for performing the other parts of his undertaking, is sufficient; for the stipulations are reciprocal, each party agreeing on his own part by way of mutual promises (*b*).

PARKE B.—I am of the same opinion. The plaintiff undertakes to discharge *Chambers* from 150*l.* of the debt due to himself, and to suffer *Ward* to stand

(*a*) Cro. Eliz. 67; Cro. Car. 70; 1 Taunt. 523; 4 Taunt. 612; 4 East, 194; 1 B. & Ald. 301.

(*b*) See 1 Chitty on Pleading, 264. 278. 4th ed.

in his place as to so much. That undertaking was valid in law, and binds him to do all that is necessary on his part to perform it, by effecting the transfer. That liability of the plaintiff remains, though *Chambers's* consent was requisite before his liability to the plaintiff could be altered by substituting *Ward* as his, *Chambers's* creditor. Then the undertaking being binding on the plaintiff, is a sufficient consideration to sustain the defendant's promise to do his part. The defendant's undertaking is properly laid as a mutual promise, viz. as made in consideration of that of the plaintiff. The declaration therefore is good, and the plea bad.

ALDERSON and GURNEY Bs. concurred.

Judgment for the plaintiff.

DOE on demise of O. H. BRIDGMAN *against* DAVID and Others.

EJECTMENT for a house and lands in *Carmarthenshire*, tried before *Parke* B. at the last assizes for that county. The lessor of the plaintiff had demised the premises, by lease dated the 30th of *December* 1816, to *Joseph Waters*, his executors, administrators and assigns, for the term of twenty-one years from *Michaelmas* 1816, at a yearly rent of 88*l.* There was a covenant for payment of rent, to which

Premises were let for 21 years to *A.*, his executors, administrators and assigns, with a proviso, that if the lessee, his executors, administrators or assigns, should become bankrupt or insolvent, or suffer any judgment to be entered against him &c. by confession or otherwise, or suffer any extent, process, or proceedings to be had or taken against him, whereby any reasonable probability might arise of the estate being extended, &c., the estate should determine and the lessor have power to re-enter. Before the term ended, the lessee died, and by will bequeathed the premises held under this demise to his executors, on trust for his (testator's) widow. One executor died and the survivor became bankrupt:—Held, that the lessor had a right to re-enter, which he might enforce by ejectment.

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was added a proviso, that if it should be in arrear for a certain time, or any of the covenants should not be performed, the lease should be void. That was followed by this proviso, "Provided also, that if the said *Joseph W.* his executors, administrators or assigns, shall become bankrupt or bankrupts, insolvent or insolvents, or suffer any judgment or judgments to be entered against him or any of them the said *Joseph W.* his executors, administrators or assigns, by confession or otherwise, or suffer any extent, process or proceedings to be had or taken against him, whereby any reasonable probability may arise of the said herein and hereby demised estate, or any part thereof, being extended or taken in execution, that then and in any or either of the said cases in this proviso mentioned happening, this present indenture of lease, and the estate and interest hereinbefore and hereby granted, and every grant, clause and thing herein contained on the part and behalf of the said lessor or his assigns, and the person and persons for the time being entitled to the perception of the rents and profits of the said hereinbefore and hereby demised estate, shall cease, determine and be utterly null and void to all intents and purposes, as if the present indenture had never been made; and that then and in any other or either of such cases or forfeiture happening, it shall and may be lawful to and for the said lessor or his assigns, or the person or persons for the time being entitled as aforesaid, into and upon the said demised estates, lands and premises, or on any part or parcel thereof, in the name of the whole, to re-enter (*a*), and the same and every part and parcel thereof to have again, repossess, and re-enjoy, as in his and their former estate, and the said

(*a*) As to this covenant see *Roe* v. *Galliers*, 2 T. R. 133. *Church* v. *Browne*, 15 Ves. jun. 268. Also 8 East, 185; 1 Atk. 168; 2 Taunt. 176.

Joseph W. his executors, administrators, and assigns, thereout to expel, remove, and put out, this indenture or any thing therein contained to the contrary thereof in any wise notwithstanding.

Joseph Waters entered on the premises thus demised and died in 1823. By will he bequeathed, amongst other things, the premises held under such demise, to his brothers *Robert* and *John Waters*, their executors, administrators and assigns, on trust to raise an annuity for his widow, and subject to such annuity in trust for the benefit of his son. He also appointed *Robert* and *John Waters* his executors. *Robert* died in 1827. In 1832 *John* became bankrupt. A fiat having issued against him, this action was brought, and the lease was contended to be void by the proviso lastly set forth. The plaintiff had a verdict, subject to leave to the defendants to move to set it aside and enter a nonsuit.

E. V. Williams moved accordingly. If the bankruptcy of the executor of the original lessee would operate as a forfeiture of the term, under the words of this proviso strictly construed, still as a forfeiture is sought to be worked by them, the court will not give to the letter of them a larger effect than is required by their spirit and meaning. The real object of the lessor in framing that proviso, was to keep the demised premises in the hands of the original lessee and his representatives, and to prevent any alienation voluntary or involuntary by them, except with his own consent in writing. Having guarded against the voluntary assignment by the tenant, he sought to hinder the effect of an alienation from him in invitum, *e. g.* by act of law, as by extents &c. "whereby any reasonable probability may arise of the estate or any part thereof being extended or taken in execution." The bankruptcy of the surviving executor *John Waters*

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does not affect the lease; for if he is an *assign* within the proviso, still being only possessed in auter droit, viz. as a mere trustee, the term in the demised premises would not pass to his assignees, and the object of the testator to preserve it in the hands of the original lessee or his representative, was not defeated by that event. Due operation will be given to the word "executors," for it may have been inserted to provide against the bankruptcy of the executor in his representative capacity, in which case the property would pass to the assignees. An executor may become bankrupt as such, where by the testator's directions he carries on his business, and in the course of that trading commits an act of bankruptcy (*a*). Here, the lessee by his will "*authorizes*, empowers and *directs*" the "executors to carry on such of his different concerns as they may deem prudent or advisable." If the strict construction of the proviso prevails, the interest of the cestui que trust will be sacrificed by the act of a person with whom she has nothing to do. [Lord *Lyndhurst* C. B. The lessor could have no knowledge of any disposition which his lessee might make by will, and only contemplated his executors.]

Lord LYNDHURST C. B.—There is no ground for granting the rule prayed. The terms of the proviso are general as respects bankruptcy, being, that if the said *Joseph Waters*, his executors, administrators and assigns, shall become bankrupt or bankrupts, the lease shall become void. The lessee's executors having the benefit of the covenants by the lessor, would also be subject to the forfeiture. It has been contended, that the word "executor" is here

(*a*) *Ex parte Garland*, 10 Ves. 117; *Thompson* v. *Andrews*, 1 Mylne & K. 116.

used in a limited sense, but there seems no ground for that assumption. The word "executors" could not have been intended to be used in a restricted sense in the first proviso; nor does any thing in it show that it was not meant to have the same sense in the proviso now before us, which immediately follows the former. That affords a sufficient reason for construing the words in their usual sense. The lessor wished to guard against having an irresponsible tenant. As the lessee's obligation to perform the covenants would devolve on his executor, the lessor did not choose that if that executor became his tenant, he should, either as a bankrupt or an insolvent, be a person unfit or unable to fulfil the covenants, so as to deprive the lessor of a substantial remedy. The words used being clear and definite, a strong case was requisite to show that they bore any but the ordinary meaning: here, however, so far from a sufficient reason being given for assigning them a limited construction only, there is clear ground for upholding them in their ordinary sense.

ALDERSON B.—I am of the same opinion. The safe and proper rule is, that words shall be taken in their natural and usual sense, unless some strong reason be assigned for giving them another. Here, the executor has become bankrupt, and the condition of the proviso has been unperformed. Then why should not the consequence of avoiding the lease follow? It is not likely that either lessor or lessee should ever have contemplated the executor's becoming bankrupt in his representative character.

PARKE B.—I remain of the same opinion which I expressed at the trial. The lessor clearly intended to provide against having an insolvent tenant. Nothing

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has been urged which would permit us to put a construction on these words different from that which they usually bear.

GURNEY B. concurred.

Rule refused.

HOOPER *against* WALKER.

The copy of a capias delivered to a defendant after his arrest under 2 *W.* 4. c. 39. s. 4. was thus indorsed: "The plaintiff claims 75*l.* 10*s.* for debt, 4*l.* 4*s.* for costs, and if the amount thereof be paid to the plaintiff or his attorney within four days from the *arrest hereon*, proceedings will be stayed." Held, that the copy was irregular in form, because varying from that provided by *Reg. Gen. Hil.* 2 *W.* 4. by substituting "arrest hereon" for "service hereof": but the court permitted the plaintiff to amend the indorsement on terms.

J. JERVIS moved for a rule to show cause why the bail-bond should not be delivered up to be cancelled, on entering a common appearance for the defendant. After the defendant had been arrested, a copy of the capias was delivered to him in pursuance of 2 *Will.* 4. c. 39. s. 4. with the following indorsement: "The plaintiff claims 75*l.* 10*s.* for debt and 4*l.* 4*s.* for costs, and if the amount thereof be paid to the plaintiff or his attorney within four days from the *arrest hereon*, proceedings will be stayed." He contended that the indorsement was irregular in form, varying from that prescribed by *Reg. Gen. H.* 1832, No. II. [*Ante*, Vol. II. p. 351.] made applicable to all writs issued under the uniformity of process act, 2 *Will.* 4. c. 39., by *Reg. Gen. M.* 1832, [*ante*, Vol. III. 2.] by using the words "arrest hereon," instead of "service hereof."

ALDERSON B.—The court will consult the other judges, in order that the practice may be uniform. The next day

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PARKE B. delivered their opinion.—We have conferred with the other judges on the subject of this motion, and they think this indorsement irregular, and the defendant entitled to the rule. But they are also of opinion, that on summons before a judge, the plaintiff should be permitted to amend the indorsement, and to use it in its amended state, in showing cause against the rule; the court would then discharge the rule, on the plaintiff's paying the costs of the amendment and of the application, the defendant having four days from the time of the amendment in which to pay the money. As this is the first case on the point, notice should be given to the plaintiff that no further proceedings will be had on the rule, if he will amend on summons taken out, and pay the costs occasioned by the irregularity up to this time. If he accedes, it will save expense not to draw up the rule, and the defendant will be allowed four days from the time of the amendment to pay the money. If he refuses to amend the rule, it may be drawn up to deliver up the bail-bond to be cancelled for irregularity with costs.

RIDGWAY *against* PHILIP and BROADHURST.

ASSUMPSIT on an agreement by defendants to make a gas vacuum engine of a specified power, (*Brown*) being patentee of an engine, (*Broadhurst*) bought a licence of him to erect it in *Cornwall* only. *Ridgway*, by agency of *Brown*, contracted with "*Brown* & Co." to erect such an engine in *Cambridgeshire*, *Brown* telling *Ridgway* that *Philip* and *Broadhurst* were his partners. During the building of the *Cambridgeshire* engine *Broadhurst* frequently came to inquire how it went on, and when it would be finished. After the engine had failed in its object, *Ridgway*, previous to suing *Philip* and *Broadhurst*, inquired from *Broadhurst* if *Brown* had been correct in declaring that *Broadhurst* and *Philip* were his partners; to which he answered that he had. He then sued *Philip* and *Broadhurst*. The jury having found a verdict for the defendants on the ground that *Broadhurst* was not a partner, the court refused to set it aside, and grant a new trial.

Where there are several defendants who defend and appear by several attornies and counsel, the latter may cross-examine the plaintiff's witnesses and address the jury separately.

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and to erect it at *Soham Mere* in *Cambridgeshire*, for the purpose of drainage. Each defendant pleaded the general issue, and several special pleas separately, and by his separate attorney. The pleadings were immaterial to the points ultimately decided, the main question being, whether or not the defendant *Broadhurst* was, under the circumstances, fixed with liability as a partner with the other defendant, *Philip*, so as to be liable in the joint action against them? At the trial at the last *Cambridgeshire* assizes before *Gaselee* J, it was proved, on behalf of the plaintiff, that the plaintiff was interested in draining a fen in that county, and that in *April* 1830, *Brown* being patentee of an invention called a gas vacuum engine, induced the plaintiff to enter into an agreement for *Brown* to erect such an engine at *Soham*, in order to a particular operation of draining. In *April* 1830, the draft of an agreement was produced by *Brown* to the plaintiff, in which *Brown* & Co. were stated to be the parties contracting; and on the plaintiff's inquiring of *Brown*, of what other persons besides him the firm consisted, *Brown* wrote on the back of the draft the following names, as those of the partners, *J. Broadhurst* Esq. and Dr. *W. Philip*. The engine was erected, but failed, proving incapable to create a perfect vacuum. In the following *May* the plaintiff having resolved to sue for the breach of the agreement, his son called on *Broadhurst* and informed him of that determination; adding, that in consequence of his name having been written down by *Brown* on the draft of agreement, as one of the firm of *Brown* & Co., he had called to know whether *Brown* had been correct in doing so. *Broadhurst* replied, that *Brown* was correct in so writing down his, *Broadhurst*'s, name, and that he had bought his share from the defendant Dr. *Philip*. It was next proved, that during the building of this engine on the premises kept

by *Brown*, *Broadhurst* attended frequently to know how it went on, and whether it was likely to be soon completed. For the defendant *Broadhurst* was produced a licence from *Brown* and the other patentees to him to use the patent for erecting engines in certain parts of *Cornwall* only; and it was thereupon contended, that as *Broadhurst's* interest in the invention was limited, his declarations must be taken with reference to that interest, and could not be construed as constituting him a general partner, either in the patent, or in the agreement for erecting this particular engine (*a*). The learned judge charged the jury, that in order to entitle the plaintiff to recover, it was incumbent on him to make out that all the parties made defendants were partners, or held themselves out generally as such to the world, or to the plaintiff before he made any agreement with them. With respect to the liability of *Broadhurst* as partner, the learned judge left it to the jury to say, whether, as stated by the witness, he had used the language representing himself to be a partner, and if he had, whether he had used it under a mistake as to the subject of the question, and whether his subsequent acts of inquiries &c. were such as afforded good ground for considering him to be mistaken. He said, that, in the absence of evidence that *Broadhurst* represented himself to be a partner, so as to procure credit before the agreement was made, the question whether he did so or not, would depend on his acts and declarations made subsequently to the agreement, and before the action brought. After recapitulating them, he left it to the jury to say whether they proved that the defendant *Broadhurst* held himself out as a partner in the patent generally, or in the contract for erecting the particular

(*a*) *De Berkom* v. *Smith*, 1 Esp. C. N. P. 29.

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engine at *Soham;* or whether his interference had taken place from a desire to satisfy himself, whether the licences held by him for using the engine in *Cornwall* were likely to be productive to him or not. In answer to a question from the jury the learned judge added, that there was no evidence that *Broadhurst* had been made acquainted with the fact of the indorsement of his name on the agreement by *Brown* in *December* 1830, at the time of erecting the engines, or till just before the action brought. The jury found a verdict for the defendants, on the ground that *Broadhurst* was not a partner.

Kelly moved for a new trial, on the ground that the verdict was against the weight of evidence. After recapitulating the facts, he said, that the defendant *Broadhurst*'s proof of his interest in the erecting similar engines in *Cornwall,* was quite consistent with the evidence adduced, to show him a partner in erecting the *Soham* engine. [Lord *Lyndhurst* C. B. If his visits and inquiries were consistent with his actual and limited interest in the success of the invention, without exceeding it, they would protect him.]

PARKE B. (*a*)—In questions of the liability of parties as partners, juries not unfrequently attach too much weight to slight or equivocal evidence of admissions. But the party making them is not estopped from contradicting them by other proofs, showing the actual nature of the contract. It was not sufficient for the plaintiff to prove acts of *Broadhurst,* which were capable of reference to a limited interest possessed by him in the patent under the licences to use it in *Cornwall;* and he was bound to show some admission made by

(*a*) Lord *Lyndhurst* had left the court before *Kelly* concluded his address.

him before the contract was entered into, that he was a partner in the particular transaction (*a*).

ALDERSON B.—The question was, whether what was done by the defendant was equivalent to holding out that he had a share in the concern, and if it was, whether it admitted an interest as a general partner, or an interest confined to a particular transaction only.

Kelly then objected, that the defendants appeared at the trial by different attornies and counsel, and that the latter were permitted to cross-examine the plaintiff's witnesses, and address the jury separately. *Chippendale* v. *Masson and others* (*b*), *Doe* v. *Tindal and others* (*c*), show that course to be improper, where the defendant's interests are the same.

PARKE B.—The course adopted in this case has been ruled to be incorrect, but I think it the proper one, and that the contrary is not a practice likely to further the ends of justice (*d*).

Rule refused.

(*a*) As to subsequent acts explaining a previous contract to be a partnership contract, see *Saville* v. *Robertson*, 4 T. R. 720; *Young* v. *Axtell*, 2 H. Bla. 242.

(*b*) 4 Campb. 174. *Gibbs* J. (*c*) M. & M. 314.

(*d*) So in *King* v. *Williamson and Clapton*, 3 Stark. C. N. P. 162, the two defendants were charged with negligence in not properly shoring up a wall, one as owner of it, and the other as his workman. They appeared by different attornies and counsel, and *Abbott* C. J. suffered each counsel to cross-examine the plaintiff's witnesses and each to address the jury, though he directed their own joint witnesses to be examined in chief by one counsel only. See also *Perring* v. *Tucker*, M. & M. 391; *Massey* v. *Goyder*, 4 C. & P. 162.

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JACKSON *against* JACKSON.

A capias directed to the sheriffs, instead of sheriff of *Middlesex*, was set aside for irregularity; for the form being provided by statute 2 *W.* 4. c. 39. schedule No. 4. must be strictly pursued.

J. JERVIS had obtained a rule to set aside a capias for irregularity in being directed to the sheriffs of *Middlesex*, citing *Barker* v. *Weedon* (*a*), *Nicol* v. *Boyn* (*b*). *Butt* showed cause, citing *Clutterbuck* v. *Wildman* (*c*), decided before the stat. 2 *W.* 4. c. 39. came into operation, in which the court refused to set aside the service of a writ of quo minus directed to the sheriff of *London*, saying, the two sheriffs of *London* and *Middlesex* make but one officer.

But *per Curiam* (*d*)—We have held, that this being a writ of which a form is prescribed by statute, that form must be pursued (*e*), and we must abide by the recent decisions.

Rule absolute.

(*a*) *Ante*, Vol. IV. 860. (*b*) 10 Bing. 339. (*c*) *Ante*, Vol. II. 276.
(*d*) Lord *Lyndhurst* C. B., *Parke*, *Alderson*, and *Gurney* Bs.
(*e*) See *Pybus* v *Bryant*, *Ante*, Vol. IV. 994.

CARR and Others, Assignees of ANTHONY CLAPHAM a Bankrupt, *against* BURDISS and BRUMELL.

A trader and soap manufacturer being indebted to his bankers in a sum of 13,147*l.* 7*s.* 5*d.* assigned to them his leasehold property, with all his engines, machines, &c. stock in trade and effects upon the same, in order to secure as well money then due, as money to be thereafter due from him to them on the balance of his account. The bankers had a power to sell the whole property assigned, including a policy of insurance on the life of the trader; but he was at liberty to remain in possession till default made in payment. At the time of executing the assignment, the trader was possessed of other property worth 13,000*l.* which was not covered by it. The trader having become bankrupt, his assignees sued to recover the property assigned; but the jury found that the deed was executed, not in contemplation of bankruptcy, but with intent to give the defendants the means of taking possession of the property in the event of bankruptcy. Held, that the assignment was good, and did not amount to an act of bankruptcy.

TROVER, by the assignees of *A. Clapham* a bankrupt, for goods, chattels, and fixtures. The first plea was, that *A. Clapham* was not nor is a bank-

rupt according to the true intent and meaning of the statute concerning bankrupts, in manner and form as in the declaration alleged. Issue thereon. The other pleadings will be better placed in the report of this case on other points, which were afterwards decided in *Hilary* term 1835. At the trial before *Gurney* B. at the last assizes for the town and county of *Newcastle-on-Tyne* the following facts appeared. *Anthony Clapham* the bankrupt had traded in *Newcastle* to a large extent as an alkali and soap manufacturer, and was one of the directors and trustees of the *North of England Joint Stock Banking Company* established at *Newcastle* in *December* 1832, under 7 *Geo.* 4. c. 46. The defendants were also directors and trustees of the bank. *A. Clapham* transferred his banking account to it, and in *July* 1833 had overdrawn it to the extent of above 13,000*l.* Being applied to for security by the other directors, a deed of assignment was prepared and executed, bearing date *July* 8, 1833, and made between *A. Clapham* of the first part, *J. Backhouse and Others* of the second part, and the defendants of the third part; and after reciting the title to certain leasehold property of *A. Clapham*, and the incumbrances thereon, and also an insurance upon his life of 1000*l.*, proceeded as follows:—" And whereas the said *A. Clapham* has, in his own name alone and in the name of *A. Clapham* and Co., for some time dealt with the said *North of England Joint Stock Banking Company*, and in order to induce them to continue their dealings with him, hath agreed to secure, in manner hereinafter expressed, as well such sum and sums of money as he the said *A. Clapham* shall for the time being, or at any time or times hereafter, be due from him on the balance of his account with the said *North of England Joint Stock Banking Company*, of whatsoever persons the same shall for the time being be constituted, as also such sum

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and sums of money as he the said *Anthony Clapham*, shall for the time being, and at any time or times hereafter, be indebted or liable to pay to such banking company upon or in respect of any bill of exchange, &c. and whether the same shall be actually due or not, together with interest at the rate of &c." The parties to the deed of the second part being the prior mortgagees of the leasehold premises, then conveyed them to the defendants, their executors, administrators and assigns, in trust for the joint stock banking company, subject to a proviso for redemption on payment of the sums of money aftermentioned; the same parties and *A. Clapham* then bargained, sold, assigned &c. to the defendants, their executors, administrators and assigns, all and singular the engines, machines, vats, coppers, boilers, and other articles and things, and stock in trade and effects belonging to the said *A. Clapham*, and in, upon, and about the said leasehold premises hereinbefore-mentioned, and intended to be hereby assigned, or any part thereof. The policy of insurance was then assigned in the same manner. Then followed a power of attorney to the defendants to receive monies due upon the policy. *A. Clapham* also covenanted to pay to the trustees of the joint stock banking company, on request, all such sums of money as he should be indebted to them in, whether the same should be actually due or not. Further, the deed gave a power of sale to the defendants, authorizing them to sell the leasehold premises and policy of insurance, and the other premises thereby assigned. It was also provided, that until default should happen to be made in payment of the monies by the deed agreed to be secured, it should be lawful for *A. Clapham*, his executors, &c. to possess and enjoy the hereditaments and premises by the deed assigned, and to receive and take the rents, issues, and profits thereof, for his own use

and benefit, without the lawful eviction or denial of the covenantors, their cestuis que trust, executors, &c. It was then recited that *A. Clapham* had deposited with the defendants the lease of a soapery, and assigned to them "all the machines, vats &c. stock in trade and effects of the said *A. Clapham*, upon or about the last-mentioned premises." At the time the deed bore date, *A. Clapham* was possessed of three ships, which in the *December* of the same year he also transferred to the joint stock banking company, as a security for a further loan of 13,000*l.* On 8th *January* 1834 the defendants took possession of the premises under the assignment, and on 9th *January A. Clapham* executed an assignment for the benefit of his creditors. On the 11th a fiat was issued, and *A. Clapham* was duly declared a bankrupt. The plaintiffs relied on this assignment at the trial as an act of bankruptcy. The jury, in answer to questions put to them by *Gurney* B. found, first, that the deed was executed not in contemplation of insolvency or bankruptcy, but with intent to give the defendants the means of taking possession of the property in the event of bankruptcy. The learned baron then put this question to them—Whether the possession taken by them on 8th *January* was bonâ fide? *i. e.* whether they took possession with intent to keep it? To which it was answered, that they took no possession.

For the defendants it was urged, that at all events the fixtures passed to them under the deed. Verdict for the plaintiffs for 12,889*l.* 12*s.* 3*d.* the amount of the goods and chattels, with leave to move to increase them, by adding to the verdict the sum of 4254*l.* 12*s.* 5*d.*; being the value of the fixtures on the premises.

F. Pollock moved accordingly. The deed by which *Anthony Clapham*'s whole property was assigned to the defendants, with intent to give them the means of

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taking possession of his property, in case of his bankruptcy, was a fraud on his other creditors, and of itself an act of bankruptcy. Then not even the fixtures passed to the defendants, who, as parties to the deed, were cognizant of the act of bankruptcy thereby committed, 6 *Geo.* 4. c. 16. s. 72. The bankrupt kept possession of all his property till the commission of another act of bankruptcy, but no trader can so deal with his property, by an assignment to a particular creditor, as to put it in his power at any time to hinder the trader from carrying on his business at any time, by acting on the power of sale contained in the deed of transfer, and seizing his utensils, stock in trade &c. Here, after he had executed the deed, *Clapham* in fact carried on the business, not for his own but for the defendants' benefit.

Lord LYNDHURST C. B.—Suppose nothing to be previously due from a trader to parties about to advance him money, a mortgage to them of his whole effects would be valid, the effect of such transfer being only the substitution of one sort of property for another, viz. money for goods (*a*). Here, however, the assignment of 8th *July* was executed with a view to cover future advances of money, as well as to pay off a former debt, and the jury have found, that it was not made in contemplation of bankruptcy; nor was it a transfer of the trader's whole property; for at the time it was taken as a security, he had other property in ships of a value nearly equal to the advances previously made.

PARKE B.—Before this assignment could be held to

(a) So a *sale* of the whole of an embarrassed trader's goods is not in itself an act of bankruptcy, *Ross* v. *Haycock*, 1 Ad. & El. 460, n. And see *Munton* v. *Moore*, 7 T. R. 67; per Lord *Kenyon* C. J. in *Whitwell* v. *Thompson*, 1 Esp. 72. and *Hunter* v. *Mortimer*, 10 B. & C. 44.

constitute an act of bankruptcy, it should have been shown that *Clapham* had no other property besides that transferred, or so little other property that by that assignment he had put the carrying on the business out of his own power. But no such case was here made out. In a case before my brother *Alderson* at *Winchester*, a carter had assigned his cart and horses, which formed his whole stock in trade; and after argument, the court held, that that assignment could only operate as an act of bankruptcy, where it was such as to produce insolvency.

ALDERSON B.—The verdict ought not to be disturbed: *Clapham* remained possessed of property equal in amount to those advances to him which this security was intended to cover. He had sufficient to purchase stock in trade &c., and was not prevented from carrying on his trade; so that the assignment was not an act of bankruptcy.

GURNEY B. concurred.

Rule refused.

ANSELL *against* SMITH.

Indebitatus assumpsit on promises to pay on request. Plea, as to part, that defendant has paid same, and in the same plea non-assumpsit to the residue; the whole concluding to the country.—Held, on special demurrer, that the plea was bad, for not concluding with a verification. *Semble*, the plea was double, and that its subject-matter should have been divided into two pleas; the first concluding with a verification, the last to the country.

ASSUMPSIT for goods sold and delivered to the defendant, and on an account stated, with promises to pay on request, concluding as usual, that the defendant had disregarded his promises, and had not paid any of the said monies, or any part thereof. Plea:

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as to fourteen shillings, parcel of the monies in the declaration mentioned, defendant says, that before the commencement of this suit he paid the same to the plaintiff; and as to the residue of the said monies, that he did not promise as in the declaration mentioned; concluding to the country. Demurrer, showing for special causes that the plea is double, and contains a two-fold answer to the said declaration; and also that the said plaintiff cannot take or offer any certain issue upon the said plea, and also that so much of the said plea as relates to the payment of the said sum of 14*s.* parcel &c. ought to have concluded with a verification and not to the country.

Dundas in support of the demurrer. The first allegation in the plea is of new matter, and should have concluded with a verification as well before as since the new rules. The payment might have been made before the commencement of the suit; and yet after the cause of action accrued by breach of the contract.

Mansel in support of the plea. The plea is good, being simply a traverse of a material fact affirmed in the declaration. The declaration alleges in the negative, that the defendant did not pay the sum therein mentioned; whereas the plea states that he did. As that is a complete joinder of issue, the whole plea ought to conclude to the country. He cited *Haydon* v. *Thompson* (*a*).

PARKE B.—The declaration states that the defendant did not pay on request. Now it is quite consistent with the terms of this plea, that the defendant did not

(*a*) 1 Adol. & Ell. 210. See 2 T. R. 439, and *ante*, Vol. IV. 1017.

make the payment till after request. A plea of payment, when so pleaded, ought to conclude with a verification.

Leave to amend on payment of costs.

SIMPSON *against* PICKERING and Others.

Peacock having conveyed a close to *Simpson*, who built a house thereon, conveyed it again to *Pickering*, who pulled down the house, and then mortgaged the property to *Peacock* as a security for the purchase-money. *Simpson* having sued *Pickering* for trespass to the close, Held, that as only a possibility appeared that *Peacock* might be a party interested, he was a competent witness for the defendant.

TRESPASS for breaking and entering plaintiff's close, and for pulling down a house there situate. Second count, de bonis asportatis. Plea: liberum tenementum in *Peacock*, as whose servants the defendants justified. The plaintiff in his replication denied *Peacock*'s title. The following appeared to be the facts, as proved at the trial at the last *Lancashire* assizes held before *Gurney* B. The plaintiff had bought five sheep gates and the locus in quo from *Peacock*, and built the house on the latter. The defendants then produced a later deed, by which *Peacock* assumed to convey to the defendant *Pickering*, among other closes, that in question, but expressly excepted it from the covenant for good title. *Pickering* had never paid for the land in question, but had mortgaged it to the seller for the amount due. *Peacock* being called for the defendant to sustain the plea, by proving his seisin in fee, was rejected by the learned judge as incompetent, on the ground that his testimony went to protect his own title as mortgagee of *Pickering*. Verdict for plaintiff. A rule for a new trial was obtained in this term by *Cresswell*, on the ground of an improper rejection of evidence. He cited *Nowell, Executor*, v. *Davis* (a), *Paull* v. *Brown* (b).

(a) 5 Barn. & Adol. 368. (b) 6 Esp. 34.

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Wightman (*F. Pollock* with him) showed cause, and after stating the above facts said, that *Peacock* had as it were taken back the close he had conveyed to plaintiff. [*Parke* B. How can the result of this action confirm or affect *Peacock*'s title to the close in question? The record of the verdict in this action cannot be used against him. He is entitled to the property under the mortgage, though the plaintiff has recovered damages for the trespass.] The defendants called *Peacock* to prove their plea, in contradiction to his own deed. [*Parke* B. That is another point.] They called him to support the right of disencumbering the close which they set up. *Peacock*'s seisin is in issue, and if defendants had had a verdict, it would have affirmed his seisin, and might be used by him in proof of his title against the plaintiff. [*Parke* B. That is the point for us to decide. It was immaterial to the mortgagee whether or not the plaintiff recovered damages. The land was already disencumbered of the house.] The whole defence is in right of *Peacock*, who is the person substantially interested, the action being defended solely in right of his seisin in fee. Suppose the plaintiff *Simpson* to be dispossessed by *Peacock* and to sue him in ejectment, then *Peacock* being identified in interest and privy in estate with the defendant *Pickering*, might give this verdict in evidence against the plaintiff; *Kinnersley* v. *William Orpe* (*a*). That was an action of debt for a penalty, for killing fish in the plaintiff's fishery. The defendant justified under *Cotton*, who had a claim to it. The defendant put in evidence a verdict for the plaintiff in a former action against *Thomas Orpe* for a like trespass, where the justification had been the same. *Perryn* B. held it admissible in evidence, both *Orpes* having acted under

(*a*) Dougl. 517.

the authority of *Cotton*, under whom *Thomas* had justified in the first action, and who was the real defendant in both causes (*a*). The difference in the names of the defendants was considered immaterial. [*Parke* B. That would be so if the parties were substantially the same, viz. if one party defended both actions.]

Cresswell and *Knowles* contrà, were stopped by the court.

PARKE B.—The objections to the competency of *Peacock* as a witness for the defendants are, first, that he was interested in the result of the action, and secondly, that if a verdict was found for the defendants, the record might be given in evidence for him on a future occasion. As to the first, the result of this action is clearly immaterial to the witness, for his mortgage security would be unaffected by it, the house having been previously pulled down. He has no legal interest in the event. In support of the second objection *Kinnersley* v. *Orpe* was cited. That case however only applies where the parties are substantially the same, which does not appear to be the case here. As to the argument, that *Peacock* came to cut down the effect of his own conveyance to the plaintiff, that circumstance would not affect his competency, but only his credit.

BOLLAND B.—I concur. The case cited does not rule the present.

(*a*) The real question in *Kinnersley* v. *Orpe* was not whether there could be an estoppel, but whether the former record in the action of trespass was at all admissible in evidence in the subsequent action for penalties for fishing under 5 *Geo. 3. c.* 14., against the defendant, who was no party to the former action. See per Lord *Ellenborough*, *Outram* v. *Morewood*, 3 East, 366. See also *Dartmouth* v. *Roberts*, 16 East, 334.

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ALDERSON B.—As *Kinnersley* v. *William Orpe* turned on the fact, that Dr. *Cotton*, under whom the defendant justified, was the real party in the former cause against *Thomas Orpe*, it only shows that where the parties are really the same, a verdict may be given in evidence. Now all that appears in this case is, that *Peacock* may possibly be the party interested.

GURNEY B. concurred.

Rule absolute.

CLEASBY *against* POOLE.

It is not sufficient cause to show against judgment as in case of nonsuit, that the plaintiff, from poverty, has neglected to furnish his attorney with money to carry on the suit.

CAUSE was shown on 11 *November* against a rule for judgment as in case of nonsuit, that the plaintiff had not proceeded to trial in consequence of his poverty, and failing accordingly to perform his promise to furnish his attorney with money to carry on the suit, a peremptory undertaking was offered.

PARKE B.—This excuse goes further than any instance I know. The courts have never extended their discretion so far.

However, the *Court* finally allowed the rule to stand over till the 17th, when a more reasonable excuse being given, the rule was discharged on giving a peremptory undertaking. *Udall* for, *Comyn* against the rule.

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M'CORMICK *against* MELTON.

A recital of facts in a judge's order is not evidence of them, so as to admit the truth of them on a demurrer to a pleading in which the order is set out.

Final process set aside for irregularity is a mere nullity and void, so that the taking the defendant under it is no satisfaction of the judgment.

DEBT on judgment. Plea, that the plaintiff sued out a ca. sa. upon the said judgment, under which the defendant was arrested and detained in execution, &c. Replication, that afterwards, and whilst the plaintiff was kept and detained in custody, under and by virtue of the said writ of ca. sa. to wit, on &c., the defendant applied to and obtained a certain order of the Hon. Sir *J. A. Park* &c., whereby it was ordered by the said Sir *J. A. P.* that the defendant should be discharged out of the said custody of the said sheriff as to the said action, for an irregularity, to wit, an irregularity then alleged by the defendant to have taken place in respect of his having been before taken in execution in the said action, and discharged for irregularity; and which said order of the said Sir *J. A. P.* was and is as follows, that is to say, "Upon hearing the counsel and attornies or agents of both parties, I do order that the defendant be discharged out of the custody of the sheriff of *Middlesex*, as to this action, for irregularity, *he having formerly been taken in execution in this cause and discharged*, defendant undertaking not to bring any action. Dated &c." And the plaintiff avers, that the defendant was then accordingly, in pursuance of the said order, discharged out of the custody aforesaid, and from the said execution, under and by virtue of the said writ, for an irregularity in respect of the said writ, and for no other cause whatever. Special demurrer showing for cause that the replication did not show that the execution was not a satisfaction of the judgment on which the action is brought.

Miller in support of the demurrer. The question is, whether the taking the defendant's body, under the

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second writ, did not satisfy the judgment. The replication shows the defendant to have been previously taken in execution under a ca. sa. and discharged; but supposing it not to show that another writ of ca. sa. existed, it is bad; for the plaintiff must be taken to acquiesce in the terms imposed by the order for his benefit, viz. that the defendant should undertake not to bring any action. Then if he consented to the defendant's discharge on those terms, he cannot take him again in execution.

Platt in support of the replication was stopped.

Lord LYNDHURST C. B.—All that we are informed by this record is, that a writ of ca. sa. issued, which was set aside by a judge at chambers for irregularity, after the defendant had been taken in execution upon it. We only know of the writ which was set aside; that was a nullity, and did not satisfy the judgment. The latter point taken has no application to the question on this demurrer.

PARKE B.—The replication sets out an order of a judge for setting aside a ca. sa. That order recites, that the defendant had been formerly taken in execution in the cause and discharged. But the mere recital in the order does not make it evidence of those facts. They might have been alleged in pleading, so as to raise the question whether they afforded an answer or not; but the judge's order annulled this writ, making it mere waste paper. Nor is there any allegation on the record that there ever was another. Then it does not appear on the record that there has been any taking in execution, so as to satisfy this judgment.

Judgment for the plaintiff (*a*).

(*a*) It was said that the other writ should have been rejoined, but *Parke* B. dissented, saying, that probably the two writs were not returnable at the same time.

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Where in a country cause a writ of trial has issued, pursuant to 3 & 4 *W.* 4. c. 42. s. 17., the plaintiff has the same time to try in as if no such order for trial before the sheriff had been made.

ISSUE had been joined in a country cause in the vacation after last term. A writ of trial before the sheriff was issued by order of a judge, pursuant to 3 & 4 *W.* 4. c. 42. s. 17., after which, and before the present term, two courts were held by the sheriff, at either of which the cause might have been brought to trial. It was not, however, tried at either, nor was notice of trial given.

Alexander obtained a rule for judgment as in case of nonsuit, citing *Mullins* v. *Bishopp* (*a*), to show that a default to try at two sheriffs' courts, after the issuing of the writ of trial, is equal to a default at two assizes.

Rawlinson showed cause. No default in proceeding to trial has taken place, as no notice of trial has been given. The motion is, therefore, premature.

PARKE B.—Defendants are seldom benefitted by forcing on the trial of a cause in the manner here attempted; indeed in the majority of cases they are injured by so doing. Nothing appears in this case which should induce us, in the exercise of our discretion, to shorten the time within which, according to the old practice, a country cause must be brought to trial. Had the plaintiff waived that practice by giving notice of trial at a particular sheriff's court, the case would have been different; for he must then have proceeded to trial pursuant to his notice and according to the practice of the court. But as no notice of trial was here given, this motion should not have been made till after the second assizes had passed without a trial be-

(*a*) 2 Dowl. P. C. 527.

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fore the sheriff, pursuant to the writ. It may be fit for us to consider whether, after a writ of trial has issued in a country cause, it should not be placed in the situation of a town cause, as far as regards the time of proceeding in it.

Rule discharged (a).

(a) This case was referred to and acted on by the court on 28 *April* 1835, in a similar case.

JUPP and Others *against* GRAYSON.
GRAYSON *against* JUPP and Others.

Where an arbitrator is a member of the profession of the law, the Court will not on that ground examine into a supposed defect in his decision on a point of law, unless apparent on the face of the record; and there is no distinction in this respect between legal and other arbitrators. Where all the costs, as well of an action as of the reference and award, are to abide the event, they need not be mentioned in the award.

THESE cross actions, as well as all matters in difference between the parties to them, were referred by a judge's order to the arbitrament of two persons, who were in no department of the legal profession. They had power to name an umpire, but the costs, as well of the actions as of the reference and award, were to abide the event. An umpire (not being a professional man) was named, who awarded in the first action that a particular sum should be paid by the defendant *Grayson* to the plaintiffs, to be by them accepted in full satisfaction of all matters in difference between them and *Grayson* at the time of referring the causes. In the second action he awarded that the plaintiff had sustained certain damages, which he ordered to be paid by the defendants to him.

Mansel moved to set aside the award. First, the award is not formal, the adjudication being not as to costs, but damages only. Next, it was urged before the umpire, that as one of the plaintiffs in the first action was not a partner with the rest, the defendant was not, in point of law, liable in that action; nor does it make any difference that this objection does not ap-

pear on the face of the record, for it was made by "lay gents," or unprofessional persons.

Lord LYNDHURST C. B.—The last objection, though in point of law, arose on the merits, and was taken before the umpire, who has decided upon it. It must therefore fail; for I recognize no distinction in this respect, between awards made by persons belonging to the legal profession and others.

PARKE B.—Though it has been laid down in some cases that the courts will not interfere where a *legal* arbitrator has decided on matters of law brought before him, I know no decision that the contrary rule prevails in the case of an arbitrator not learned in the law. Nor can I see any reason for such a distinction. The other objection also fails, for the arbitrators had no power over the costs.

ALDERSON B.—In the course of last term a distinction in this respect between professional and other arbitrators was set up, and my mind was then impressed with the opinion that it had been recognized by the decisions: but I have since considered the subject, and am of opinion that there is no ground for any such distinction. The arbitrator, whoever he may be, is fixed on by the parties as judge of all matters of law or fact which may arise between them, and though not in the profession of the law, he is no less a judge between them, by whose decisions they must abide.

GURNEY B. concurred.

Rule refused on both points (*a*).

(*a*) In *Ashton v. Pointer*, in this term, 20th *November*, the court again adverted to and acted on their decision in the principal case.

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BRADBURY and Others, Assignees of LEATHER a Bankrupt, *against* ANDERTON.

After *L.* a trader had committed a secret act of bankruptcy, *M.* & Co. his creditors, knowing him to be embarrassed, pressed him for payment. *L.* said he had no money, but that if they could get a customer for his goods, they should be paid. *M.* & Co. accordingly procured the defendant *A.*, a creditor of their own, to buy goods of *L.* No money passed from *A.* to *L.* or to *M.* & Co. but *A.* gave *M.* & Co. credit on account. This transaction was communicated to *L.*, and a receipt was given him by *M.* & Co. signed by them, specifying it to be "by payment of defendant *A.* agreeably to his order, balancing their account with him." A fiat having issued against *L.* his assignees sued *A.* in assumpsit for the price of the goods sold to him. Held, first, that if the appropriation of the price to *M.* & Co. was parcel of the contract between *A.* and *L.*, and by its terms irrevocable, the action should have been trover; for by waiving the tort and affirming the contract, the assignees adopted it in all its parts, though a further question would arise, whether the payment relied on by *A.* the defendant, as made in pursuance of the contract, was a payment protected by 6 *G.* 4. c. 16. s. 82. Secondly, that if the payment by *A.* the defendant to *M.* & Co. was not stipulated for in the original contract, but was merely directed afterwards by *L.*, and had not been acted on, that direction was revocable by him before his bankruptcy, or by his assignees after that event, and the plaintiffs were entitled to recover.

ASSUMPSIT. The first set of counts was by the plaintiffs as assignees, for goods sold and delivered, work and labour, money paid, lent, and had and received, interest, and on an account stated before the bankruptcy of *Leather*, laying the promises to him, and averring non-payment to him before his bankruptcy, and to his assignees since. A second set of counts was for goods sold and delivered by the plaintiffs as assignees, for interest due to them, and on an account stated with them. Plea: non assumpsit, with notice to dispute the trading, the petitioning creditor's debt, and act of bankruptcy. The action was commenced before the new rules of pleading came into operation. At the trial before *Gurney* B. at the last *Lancashire* assizes, it appeared that the bankrupt had been a dealer in fustian at *Newton*, and on 12th *December* 1833, owed *Moss* & Co. the sum of 110*l.* 12*s.* His affairs being then embarrassed, *Moss*'s son, by direction of his father, pressed for payment of that sum as due to *Moss* & Co. *Leather* replied, that he had no money, but would pay the debt if they would get a customer for his goods. On *Sa-*

turday the 14th the defendant, at the instance of *Moss* & Co. who were indebted to him, selected goods from *Leather's* stock to the amount of 131*l.* They were invoiced and delivered to him on *Monday* the 16th. On *Tuesday* the 17th young *Moss* told *Leather* what had been arranged between the defendant and *Moss* & Co. and asked if the latter had settled with the defendant. On the same day *Moss* & Co. gave the following receipt, signed by them to *Leather*:—"Received from Mr. *J. Leather* by payment of Mr. *John Anderton*, agreeably to his order, 110*l.* 12*s.*, balancing an account with him." No money was in fact paid by defendant to *Moss* & Co., but they were credited in account with him. *Leather* committed an act of bankruptcy on 30th *November*, and a fiat issued against him on 21st *December*. *Moss* & Co. defended the action and indemnified the defendant. The defendant's counsel contended, that as the assignees had affirmed the bankrupt's contract, by suing in assumpsit, the defendant was discharged by his giving credit on account to *Moss* & Co. at request of *Leather*, which was equivalent to payment for the goods; and secondly, that if the transaction was a fraudulent preference of *Moss* & Co. trover was the proper remedy. The learned baron overruled the objections, without giving leave to move to enter a nonsuit, and the plaintiffs had a verdict. A rule to show cause why the verdict should not be set aside, and a new trial had, was obtained in this term.

F. Pollock and *Alexander* now showed cause. This action is maintainable by the assignees, either in right of the bankrupt or in their own. First, they are entitled to recover in right of the bankrupt, for had he not become so he might have sued on the defendant's contract with him to pay for the goods sold, for the

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defendant's passing the money in account to the credit of *Moss* & Co. was not a payment by them to him, so as to prevent the title of the assignees from accruing; *Cox* v. *Prentice* (a). The verdict proceeded on the jury's belief that the whole transaction was fraudulent. The direction to pay *Moss* & Co. was a mere order, which the assignees after the bankruptcy had the same right to revoke as the bankrupt had before that event, for it had never been acted upon. Suppose a trader to sell goods to *A.*, directing him to pay the purchase money to *B.*, a creditor of the trader, then if an act of bankruptcy intervenes before the money is actually paid, would not the assignees have a right to revoke the authority and stop the payment to *B.*, and to claim it for themselves on behalf of the creditors? They might then affirm the contract and sue in indebitatus assumpsit for goods sold. In *Gibson* v. *Minet* (b), a party keeping an account with the defendants who were bankers, gave them an order requesting them to hold 400*l.* to the disposal of *J. M.* & Co. who also kept cash at their bank. He countermanded the order before actual payment of the money. Lord *Gifford* told the jury, that if they thought the order not absolute and accepted as such by the defendants, but executory and not acted on, that then the plaintiff had a right to revoke it, and did so in time, and a verdict for the plaintiff under that direction was supported in the court above. Nor could *Moss* & Co. have sued the defendant for the price of the goods; for his contract to pay for them was not made with them, but with *Leather*, so that he only, or his representatives, could sue (c).

Secondly, the assignees had a right to sue in this

(a) 3 M. & S. 334. (b) 2 Bing. 7; Ry. & M. 68, *S. C.*

(c) See *Williams* v. *Everett*, 14 East, 582; *Scott* v. *Porcher*, 3 Mer. R. 258.

form of action, as on a contract made with them as such. It will be said that by suing in assumpsit they affirmed the contract with all its consequences, and that if they relied on its being founded in fraud, they should have sued in trespass or trover. But they were at liberty to waive the tort and sue for non-performance of this contract; for as it had been broken by the non-payment to *Moss* & Co. the case became the common one of goods sold by a bankrupt, and not paid for by the buyer. *Billon* v. *Hyde and Michel* (a) was cited at the trial to show Lord *Hardwicke's* dictum, that it appeared new to him to permit assignees to maintain assumpsit for money paid by the bankrupt to another person after a secret act of bankruptcy, and that he had always thought that assignees were in such cases obliged to bring an action of tort, either trover or trespass. But that case is overruled in *Hitchin* v. *Campbell* (b), *Poland* v. *Glyn* (c), and assumpsit is now usually brought; the only inconvenience of so affirming the contract being, that the defendant may set off any debt due to him from the bankrupt; *Smith* v. *Hodson* (d).

(a) 1 Atk. 126. Lord *Hardwicke* added, that *Holt* C. J., *Parker* C. J. and *Raymond* C. J. were of the same opinion; but in the report of this case, in 1 Ves. sen. 330, S. C., Lord *Hardwicke* himself says the judges had since admitted the action of money had and received, instead of trover.

(b) 3 Wils. 308; 2 Bla. R. 827, S. C.

(c) 4 Bing. 22 (n), 2 D. & R. 310, S. C.

(d) 4 T. R. 211. See *Tamplin* v. *Diggins*, 2 Camp. 212; *Hunter* v. *Prinsep*, 10 East, 391. 418; *Kinder* v. *Butterworth*, 6 B. & C. 45. 48. as to bankruptcies before 1825. See now 6 G. 4. c. 16. s. 50., *Thorpe* v. *Thorpe*, 3 B. & Adol. 580, cited in *Simpson* v. *Simpson*, 1 Bing. New Cases, 308; *Buchanan* v. *Findlay*, 9 B. & Cr. 738.

In *Thomas* v. *Whip*, *Tr.* 1 *G.* 1. *Buller's Ni. Pri.* 130, (cited in *Miller* v. *West*, 1 Burr. 458; and by Lord *Hardwicke*, in *Billon* v. *Hyde*, as reported 1 Ves. sen. 329.) *Parker* C. J. said, he knew but of two cases where the party had not such election; the one was in case of money lost at play, and the other in case of money paid by a bankrupt, though on a valuable consideration, after the act of bankruptcy committed; in either of which cases the action must be trover, for you cannot confirm

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[*Parke* B. In *Ferguson* v. *Carrington* (*a*), goods were sold on credit to a party who at the time of the contract fraudulently intended not to pay for them. The vendor, however, sued in assumpsit before the credit had expired, and the Court held, that though trover might have been supported, assumpsit could not. That shows that by suing in assumpsit on a contract made by the bankrupt, assignees adopt the contract as it stands, with all its consequences.] It may be admitted that that case proceeds on the ground that the plaintiffs could not substitute an implied contract for the express one which existed between them, whereas here the assignees adopt the express contract made with the bankrupt. On the other ground, *De Symons* v. *Minchwich* (*b*), and *Hogan* v. *Shee* (*c*), are contrary to *Ferguson* v. *Carrington*, nor were they cited in the argument of that case. [*Parke* B. If one contract is shown to have actually existed between the same parties, the law will not imply another. *De Symons* v. *Minchwich* has been overruled (*d*).] The bankrupt being conusant of the fraud may be prevented from claiming against the defendant under any implied contract, but his assignees, who are not original parties, and come in without being conusant of his acts, cannot be similarly estopped; for though they enjoy all his rights, they are not clogged with his personal liabilities or incapacities. For the sake of the creditors they may disaffirm contracts which would bind him, and maintain actions

the act in part and impeach it for the rest; and Lord *Hardwicke*, mentioning this case, said he always so held it, and had nonsuited many plaintiffs in actions of assumpsit under such circumstances.

(*a*) 9 B. & Cr. 59.

(*b*) 2 Esp. C. N. P. 430, *Eyre* C. J.

(*c*) 2 Esp. C. N. P. 523, (Lord *Kenyon*.)

(*d*) Viz. in *Strutt* v. *Smith*, *Ante*, Vol. IV. 1020; where *Hogan* v. *Shee* was also cited and disregarded.

which he could not (a). So in this case they may insist that the transaction to which the bankrupt was party was a fraud, so that no property passed, or they may waive the fraud, or in other words the right to damages for the tort (b), and rely on an implied contract of sale. *F. Pollock* here alluded to a case before *Gibbs* C. J. (not reported) in which *Best* Serjt. was of counsel. The object was to get payment of a bad debt by a trader. The defendant, a third person, selected goods out of his stock, consulted as to their prices and quality, and directed them to be sent to his place of business, where they were accordingly delivered. [*Parke* B. *Hill* v. *Perrott* (c), or *Abbotts* v. *Barry* (d), may be the case to which you refer. The ground of the latter decision was, that the defendant having procured goods to be sold to a party known to him at the time to be insolvent, in order to obtain the produce of them himself, the court thought themselves justified in implying a contract by him to pay for them, as the goods had been sold by his direction, and brokerage, and the express contract was void on account of fraud. There the goods were in the hands of a third person, and the parties to the two contracts were different.] They are not identical here, for the assignees were not parties to the original fraudulent sale by the bankrupt to the defendant. Then the plaintiffs may recover either on the contract made by the bankrupt, which they may adopt and treat as unperformed, or in their own right, by waiving the tort and suing in assumpsit on the defendant's implied contract to pay for goods, which he has not paid for, though delivered into his possession, and which

(a) See per *Holroyd*, J. *Poland* v. *Glyn*, 2 D. & R. 315.

(b) See 10 *East*, 391. *Hunter* v. *Prinsep*.

(c) 3 Taunt. 274, tried before Sir J. *Mansfield* C. J.

(d) 2 Br. & B. 369, tried before *A. Park* J.

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are now the property of the assignees. [*Parke* B. *Fair* v. *M'Iver* (*a*) does not seem to apply.]

Blackburne and *Starkie* in support of the rule. No contract exists on which the plaintiffs can sue, either as assignees or in their own right; for the only contract which existed was made between *Leather* and the defendant, and stipulated that the price should be paid to *Moss* & Co. That has been performed, for the defendant's giving credit for it on account, or in other words, remitting so much of *Moss* & Co.'s debt to him at request of *Leather*, and in respect of a debt owing from *Leather* to *Moss* & Co. was equivalent to payment (*b*). *Cox* v. *Prentice* is inapplicable, for the situation of the parties was not there altered, whereas in this case it was changed by the bankruptcy of *Leather* after the parties had acted on the contract. [*Alderson* B. assented.] Still less can any contract be implied on which the assignees will be entitled to sue. The general rule is, that where there is an express contract no other can be implied; and if that rule prevents the law from implying any contract for the benefit of the bankrupt himself, *à fortiori* none can be implied for that of his assignees, who are confined to those rights of suing which he might have exercised had he not been bankrupt (*c*). The authorities are numerous and uniform. In another passage of *Billon* v. *Hyde* (*d*), Lord *Hardwicke* said, "to raise an assumpsit, the assignees must maintain a contract either in fact or by relation, and here the contract on which

(*a*) 16 East, 130.

(*b*) See *Skyring* v. *Greenwood*, 4 B. & C. 280; *Bramston* v. *Robins*, 4 Bing. 15, per *Best* C. J.

(*c*) *Smith* v. *Hodson*, 4 T. R. 211. *Morgan, assignee*, v. *Brundrett*, 5 B. & Adol. 289; *Hill* v. *Farnell*, 9 B. & C. 45; *Cash* v. *Young*, 2 B. & C. 413.

(*d*) 1 Atk. 128.

the assumpsit is maintained, is by the interposition of the bankrupt, and therefore I think he ought to be considered as the factor of the assignees, and if they will take this method and affirm the contract done by the bankrupt, they must take him as their factor in all acts done fairly and without deceit." He then cites *Wilson* v. *Poulter* (a). *Smith* v. *Hodson* (b) is another leading case, in which Lord *Kenyon* said, "the assignees, by bringing the action on the contract, recognised the act of the bankrupt, and must be bound by the transaction in the same manner as the bankrupt himself would have been, and if he had brought the action the whole account must have been settled, and the defendant would have had a right to set off the amount of his bill;" and a judgment of nonsuit was entered on the distinction between the actions of trover and assumpsit. *Ferguson* v. *Carrington* (c) again confirmed that doctrine, and was relied on by this court in *Strutt* v. *Smith* (d). *Hitchin* v. *Campbell*, which was cited on the other side, merely established that money had and received would lie by assignees of a bankrupt for goods of the bankrupt, which were seized under an execution subsequent to the act of bankruptcy; and Lord *Kenyon* cites it in *Smith* v. *Hodson* in support of his judgment. [*Parke* B. The contract was for payment of money to *Moss* & Co. Then supposing it broken, could the bankrupt have sued before his bankruptcy? The defendant's argument must be, that according to the contract it was not competent to the bankrupt to order payment to any other than *Moss* & Co.] Lastly, it was contended that the whole transaction was fraudulent, so as to avoid the express and actual contract; and consequently that a contract by

(a) *Str.* 859.

(b) 4 T. R. 211. See also *Hussey* v. *Phydall*, 12 Mod. 324.

(c) 9 B. & C. 59. (d) *Ante*, Vol. IV. 1020.

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the defendant to pay for the goods of which he had obtained possession, must be implied. But nothing in the case shows either moral or legal fraud in the defendant. For as creditors may legally press for and obtain the payment of a just debt, this payment, (unless made in contemplation of bankruptcy, as well as insolvency (*a*),) is protected by 6 *G.* 4. c. 16. s. 82. which enacts, that payments really and bonâ fide made to a bankrupt before the date and issuing of the commission against him, shall be valid notwithstanding any prior act of bankruptcy. [*Parke* B. The question in the case arises on breach of contract, and nothing turns on any point of fraudulent preference, for pressure is out of the case, all the facts having taken place after the act of bankruptcy. If the original contract had not stipulated for making the payment to *Moss* & Co., but that term had been added on a subsequent day, it would have been good ground for considering the payment as not protected by s. 82.] The fact that *Moss* & Co. had indemnified the defendant does not alter the case. If the plaintiffs can sue at all it must be in tort, and to hold that assumpsit will lie is to confound the forms of action, which it is most important to preserve distinct.

PARKE B.—I am of opinion that the rule must be made absolute for a new trial. This is an action brought by the assignees of a bankrupt to recover the price of goods sold and delivered to the defendant by the bankrupt. In one set of counts the defendant's promises to pay are laid to be made to the bankrupt, and in the other to the assignees. The evidence shows, that on the 12th *December*, and after the act of bankruptcy, *Moss* & Co. had some communication with the bankrupt as to the debt due from him to

(*a*) See *Morgan* v. *Brundrett*, 5 B. & Adol. 289.

them; and it appears to me that the opinion of the jury should have been obtained with regard to the nature of that communication, which might be a matter decisive of the case. There was but one contract for sale of goods by the bankrupt to the defendant. For the defendant it was contended to be mutual between them, binding the defendant to pay the price to *Moss* & Co., and that it was parcel of that contract that *Moss* & Co. were to have an irrevocable right to that amount. For the plaintiffs it was urged, that this was the simple case of a contract for sale of goods by the bankrupt to the defendant, to be paid for on request, with a direction by the bankrupt to pay over the money to *Moss* & Co.; which direction amounted to no more than a mere collateral authority or appropriation of the payment to them. It was also said, that if the contract existed at all it was void for fraud; in which case the law would imply another contract founded on the delivery of the goods to the defendant. If the sale was of the ordinary kind, with a mere authority or direction to the defendant to pay over the price to *Moss* & Co., that direction might have been at any time countermanded by the bankrupt or his assignees before the money had been paid over; and his assignees had a right to elect whether they would adopt the contract and sue on it in assumpsit, or whether they would disaffirm it on the ground of fraud, and bring trover. By electing to adopt the contract they must be taken to have adopted it throughout, so that if it really was that the price should be paid, not to the bankrupt, but to *Moss* & Co. and that it should be money irrevocably appropriated to them, they had a direct interest in it, and this form of action is wrong. Viewing this as an ordinary contract of sale, accompanied by a mere direction as to payment, another question arises, whether this payment was protected as a bonâ fide payment by

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6 G. 4. c. 16. s. 82. Upon that question, if it appeared that a payment had been made by a settlement of account between the defendant and *Moss* & Co., not in the ordinary course of business, but three days after the transaction of sale, a jury would probably think the whole transaction colourable only. It has been already observed, that instead of affirming the contract, the assignees might have avoided it by suing in trover. That would have been treating it as a disposition by the bankrupt of property which had become that of his assignees, by relation to his previous act of bankruptcy. The whole case then turns on the question, what was the nature of the contract made by the bankrupt? For if it was only a direction by him to the defendant to pay *Moss* & Co., which was not done, he or his assignees might countermand it, and the action is maintainable; whereas if it was originally parcel of the contract, that the defendant should pay the price to *Moss* & Co., who were to have an irrevocable interest in it, he has a good defence to this action of assumpsit. The present evidence of the contract is equivocal, and capable of either construction. A new trial must therefore be granted, that a jury may decide what its real nature was. The whole question turns upon this, whether or not a stipulation to pay the price to *Moss* & Co. formed part of the original contract?

BOLLAND B.—The law cannot be applied to the present state of facts; for the question, what was the nature of the contract, has not yet been decided by a jury.

ALDERSON B.—There was but one contract, and the question is, what it was? Upon that the evidence is so vague, that the whole should be sent to another

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jury. If it was part of the contract, that the price was to be irrevocably fixed in *Moss* & Co. so as to vest the interest in it in them, the assignees cannot recover in assumpsit; for by affirming the contract in one part, they adopt it throughout. If, on the other hand, the original contract on the part of the bankrupt was to sell to the defendant, but it was afterwards settled that payment should be made by him to *Moss* & Co. it would then be a question for a jury, whether that was a *bonâ fide* payment protected by sect. 82 of 6 *G.* 4. c. 16. It is probable a jury would find that this stipulation did not form part of the original contract, and that the payment was not so protected. If *Moss* & Co. were solvent there seems no motive to actuate the defendant to commit any fraud.

GURNEY B.—*Moss* & Co. having found, on applying to the bankrupt for payment, that he had no money, used what appears to be a contrivance to procure goods from his warehouse. The transaction appears a juggle, entirely directed to that object.

Rule absolute.

MINTER *against* WELLS and Another.

A patentee summed up his invention thus: "My invention is the application of a self-adjusting leverage to the back and seat of a chair, whereby the weight on the seat acts as a counterbalance to the pressure against the back of such chair, as above described."—Held, that the patent was valid; for without assuming to appropriate the principle of the lever, it claimed the invention of means by which that principle was applied to a chair in a new manner.

CASE for infringing a patent obtained by the plaintiff for an invention called "*Minter's Patent Reclining Chair.*" At the trial before *Alderson* B. at the

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last *Middlesex* sittings the plaintiff had a verdict, with leave to the defendant to move to enter a nonsuit, for a defect alleged to exist in the specification. The invention was thus described in the specification:—

"My invention of an improvement in the construction, making, or manufacturing of chairs, consists in the *application of a self-adjusting leverage to the back and seat of a chair*, whereby the weight on the seat acts as a counterbalance to the pressure against the back of such chair, and whereby a person, sitting or reclining on such chair, may, by pressing against the back, cause it to take any inclination, and yet at the same time the back of such chair shall, in whatever situation it is placed, offer sufficient resistance and give proper support to the person so sitting or reclining in such chair." The specification then set forth the mode of making and using the chair, and concluded thus:—"Having now described the various parts represented in the drawing, and the manner of their action, I would have it understood that I lay no claim to the separate parts of a chair which are already known and in use, neither do I confine myself to making them in the precise shapes or forms represented. But what I claim as my invention is, the application of a self-adjusting leverage to the back and seat of a chair, whereby the weight on the seat acts as a counterbalance to the pressure against the back of such chair, as above described."

Godson moved to enter a nonsuit, pursuant to the leave reserved. The plaintiff either claims to appropriate a principle, or the mechanical means of applying it. The law precludes him from appropriating the first, and the second has not been infringed in point of fact by the defendant, whose chair is not made in the

way described in the specification. What the plaintiff claims, is nothing more than the principle of the common lever, expressed in the terms "self-adjusting leverage," and applied to the back of a chair. Then the patent cannot be supported; the claim to the invention having been summed up for a mere principle. In *The King* v. *Cutler* (a) Lord *Ellenborough* said, the defendant, by thus summing up the extent of his invention, has confined himself to the benefit of the principle, and the patent was repealed. On the contrary, where two patents for evaporating sugar were founded upon the same principle of employing a low temperature, but neither claimed the principle, and employed different methods and apparatus, both were held good; *Hullett* v. *Hague* (b).

Lord LYNDHURST C. B.—Every invention of a machine necessarily includes the application of some principle, and, in this instance, the application of the principle of a lever to the back and seat of a chair is the machine, the invention of which is claimed by the plaintiff. He has not summed up the extent of his invention, so as to include in it the principle of the lever, but merely the invention of applying it in the manner specified. The claim is not leverage only, but self-adjusting leverage; nor that only, but the application of it in the manner described. He says, "I claim the application of a self-adjusting leverage applied to the back and seat of a chair, whereby the weight on the seat acts as a counterbalance to the pressure against the back of such chair, *as above* described." That back and seat are so placed and contrived that the pressure on the back is varied and counterbalanced by that on the seat. Any machine applying a self-adjusting

(a) 1 Stark. C. N. P. 355. (b) 2 B. & Adol. 370.

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lever to the back and seat of a chair, by which the effect of one counterbalancing the other is produced, would be an infringement of this patent: for the claim is for a self-adjusting lever, as applied to the back and seat of a chair, in whatever shape or form it may be made.

PARKE B.—What is claimed as an invention is not the principle of the lever, but merely the mechanical contrivance by which the principle is combined with, and made applicable to, the construction of a chair adjusting itself in a manner regulated by the mere act of sitting in it. The plaintiff only claims the combination, and that is admitted to be new.

ALDERSON B.—All the witnesses proved that the principle of self-adjusting leverage had never been applied to a chair before the plaintiff's invention (*a*). By pressure on the back the seat rises, and vice versâ.

GURNEY B. concurred.

(*a*) *Godson* produced an affidavit that one *Lutton*, who was sworn by a witness to have been the original inventor, could not be found before or at the trial to prove that fact, though he appeared just after it had concluded. Lord *Lyndhurst* C. B. That is not conclusive; you may apply for a scire facias to repeal the patent.

COOPER *against* PHILLIPS.

In assumpsit for goods sold, defendant pleaded non-assumpsit to all except 20*l.* 9*s.*, and as to that sum that defendant being in bad circumstances and indebted to plaintiff in that sum, and to other persons respectively in large sums, and unable to pay those debts in full, the plaintiff and the said other creditors mutually agreed with each other and the defendant to take 5*s.* in the pound, as a composition on

ASSUMPSIT for goods sold and delivered, and on an account stated. Plea: and the said defendant, as to all the said supposed promises in the said decla-

ration mentioned, except as to the sum of 20*l.* 9*s.* parcel of the said monies in the said declaration mentioned, says, that he did not promise in manner and form as the plaintiff has above thereof complained against him (concluding to the country); and as to the sum of 20*l.* 9*s.* parcel of the said monies in the said declaration mentioned, says, that after the making of the said supposed promises in the said declaration mentioned, as to the sum of 20*l.* 9*s.*, and before the commencement of this suit, to wit, on the 1st day of *July*, in the year of our Lord 1830, the defendant was in bad and embarrassed circumstances, and indebted to the plaintiff in the said sum of 20*l.* 9*s.* parcel &c., and to divers other persons respectively, in divers large sums of money, and was unable to pay the said plaintiff, and the said other creditors of the defendant respectively, their debts in full, whereof they then had notice, and thereupon the defendant then offered and agreed with the plaintiff and the said other creditors of the defendant to pay them respectively. And the said plaintiff and the said other creditors then mutually agreed with each other, and with the defendant, to accept of him 5*s.* in the pound, as a composition upon and in full satisfaction and discharge of their said respective debts, such composition to be paid by the said defendant to the plaintiff, and the said other creditors of the defendant respectively, as follows, to wit, half thereof down, and the remainder divers, to wit, six months then following;

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and in full satisfaction and discharge of their respective debts, and that the defendant was ready and willing to pay 5*l.* 2*s.* 3*d.*, the amount of the composition, but that plaintiff refused to receive it, and discharged defendant from tendering and paying it:—Held, on demurrer, that as the plea was pleaded to the whole 20*l.* 9*s.* it was bad; for it afforded no answer as to the 5*l.* 2*s.* 3*d.*, which it did not show to have been paid, or tendered and paid into court, but merely stated that the plaintiff had discharged the defendant from tendering or paying it to him, without alleging any consideration for such discharge.

Quære, whether the plea should not have stated the plaintiff's acceptance of the mutual promises in satisfaction of his debt?

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and the plaintiff and the said other creditors of the defendant then mutually agreed with the defendant not to proceed against the said defendant for the recovery of the residue of the said respective debts and demands, unless default should be made in payment of such composition. And the said defendant further saith, that the composition or sum of 5*s.* in the pound on the said sum of 20*l.* 9*s.* amounts to a large sum, to wit, the sum of 5*l.* 2*s.* 3*d.* And that he the said defendant, at the time of making the said agreement in this plea mentioned, and always from thence hitherto hath been and still is ready and willing to pay to the said plaintiff the said composition on the said sum of 20*l.* 9*s.* parcel, &c., but to receive the same, or any part thereof, of the defendant, he the said plaintiff hath always wholly refused. And the plaintiff then discharged the defendant from tendering or paying to him the said plaintiff the said composition, at the times for payment thereof, or at any other time. Verification—General demurrer (*a*) and joinder.

W. H. Watson in support of the demurrer. The

(*a*) The following matters of law were stated in the margin, pursuant to *Reg. Gen. Hil.* 4 *W.* 4. No. I. *Ante*, Vol. IV. p. i. The plea is insufficient, first, because 5*l.* 2*s.* 3*d.*, the amount of the composition on the debt due from defendant to plaintiff, is no satisfaction of 29*l.* 9*s.* The composition set forth in the plea is not binding on the defendant, because it is not stated to have been by deed. There is no consideration shown for the plaintiff's engagement to accept 5*s.* in the pound on the amount of the sum owing to him, as there is no guarantee for the payment of that composition, or any other security for the same, but that of the defendant himself; nor is there any fund fixed out of which the plaintiff may receive the same. It is not stated that the plaintiff and the other creditors agreed with each other, as well as with the plaintiff, not to proceed against the defendant; and it is not stated that the defendant tendered and offered the amount of the said composition to the plaintiff; nor has the defendant shown that the plaintiff did any act dispensing with such tender on his the defendant's part.

plea is bad in form. First, because though the mutual agreement by the plaintiff and the other creditors of the defendant with each other and the defendant to accept of him 5*s.* in the pound as a composition upon and in full discharge and satisfaction of their respective debts, is pleaded in the early part of the plea, it does not go on to state any acceptance by them of those mutual promises in accord and satisfaction of those debts (*a*). Nor does the plea show that the 5*l.* 2*s.* 3*d.* was paid to the plaintiff, or that after tender it has been paid into court; or that that part of the composition which was to be paid down, was so paid. [*Parke* B. It appears affirmatively that default was made in payment of the

(a) See *Case* v. *Barber*, Sir T. Raym. 450; Sir T. Jones, 168; *S. C.* cited by *Parke* J. in *Wentworth* v. *Bullen*, 9 B. & Cr. 850. Comyns, in his Digest, tit. *Accord and Satisfaction* (C), cites *Case* v. *Barber*, and *Wickham* v. *Taylor*, Sir T. Jones, 168, in support of the position, that "if a man plead an accord as a mutual agreement, the defendant must show such an agreement upon which an assumpsit is maintainable, and on which an action is given at the time of the assumpsit." In *Good* v. *Cheeseman*, 2 B. & Adol. 335, *Parke* J. cited *Case* v. *Barber*, and *Wickham* v. *Taylor*, as they are thus stated in another part of the same title in Com. Dig. "It is laid down in Com. Dig. tit. *Accord* (B. 4), that an accord with mutual promises to perform is good, though the thing be not performed at the time of action, *for the party has a remedy to compel the performance*; but the remedy ought to be such that the party might have taken it upon the mutual promises at the time of the agreement." He then added, "Here each creditor entered into a new agreement with the defendant, the consideration of which to the creditor, was a forbearance by all the other creditors who were parties, to insist upon their claims. Assumpsit would have lain on either side to enforce performance of this agreement, if it had been shown that the party suing had, as far as in him lay, fulfilled his own share of the contract. I think, therefore, that a mutual engagement like this, with an immediate remedy given for non-performance, although it did not amount to a satisfaction, was in the nature of it, and a sufficient answer to the action." And see 1 Ventris, 41. 178. See also *Stemman* v. *Magnus*, 11 East, 390, that an agreement by a particular creditor to take less than his debt becomes binding, where other creditors have been induced by that agreement also to take less than their demands; and *Greenwood* v. *Lidbetter*, 12 Pri. R. 123.

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composition. The defendant was to do the act of paying the composition, and to tender the amount, but is not alleged to have done so. I read the agreement in this sense, that if default was made in the payment of his share of the composition to any particular creditor, he might sue, but not that all the creditors might sue in case of any such default. The plea should have been pleaded to the 20*l.* 9*s.*, minus the 5*l.* 2*s.* 3*d.* Now a plea professing to be an answer to the whole declaration, but being in fact an answer to part only, is bad (*a*). [*Alderson* B. The plea admits the plaintiff's right to the 5*l.* 2*s.* 3*d.* without showing it paid, or that it was tendered and paid into court as so much money due for goods sold, or on an account stated.] He was then stopped by the court.

Ross in support of the plea. The mutuality secondly mentioned is that before referred to, viz. that between the plaintiff and defendant, and between the plaintiff and the other creditors. If that agreement was made, the consent of the other creditors to take a reduced sum in discharge of their debts was a good consideration for it, so as to take away the plaintiff's remedy for the old debt, and to substitute one by special assumpsit on the agreement (*b*). The defendant is left liable to pay the 5*l.* 2*s.* 3*d.* on the agreement stated in the plea; and a good consideration is shown on the face of the plea for pleading the matter in satisfaction of the larger sum.

PARKE B.—The question is, whether the plaintiff could not have recovered the 5*l.* 2*s.* 3*d.* on the count on an account stated, without being bound to declare on the

(*a*) See an instance, *Thomas* v. *Heathorn*, 2 B. & Cr. 480.

(*b*) See *Parke*'s judgment in *Good* v. *Cheeseman*, 2 B. & Adol. 335.

agreement? If he could have so recovered, the defendant has not answered the whole declaration, though by the plea he professes to do so. There is no more answer to the claim of *5l. 2s. 3d.* than this, that the plaintiff discharged the defendant from tendering it; but no consideration is shown for that. The plea should be amended, and pleaded to the residue, minus the *5l. 2s. 3d.*, which should be paid into court.

The other Barons concurred.

Leave given to amend accordingly, on payment of costs and producing an affidavit of merits.

BLACK *against* SANGSTER.

A plaintiff who has obtained an order to amend his declaration, with leave to defendant to plead de novo, may proceed to trial without rescinding that notice.

THE plaintiff, after obtaining an order to amend his declaration, and leave granted to defendant to plead de novo, did not amend, but gave notice of trial for the last *Surrey* assizes, and obtained a verdict, the cause being tried as an undefended cause. *Buckle* for the defendant now moved to set aside the verdict. Before the plaintiff could proceed to trial he was bound to rescind the order to amend which he had himself obtained, *James* v. *Kirk* (*a*).

PARKE B.—The plaintiff had leave to amend, but on terms which he did not think fit to accept. He was therefore at liberty to proceed to trial on the declaration as it stood, so that there is no irregularity. But as there is an affidavit of merits, the rule may be granted on terms.

(*a*) 1 Chit. R. 246.

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STEIN and Another *against* YGLESIAS and Others.

In an action by indorsees against the acceptor of certain bills of exchange, defendant pleaded in one plea that the bills were accepted at the request of and for the accommodation of a third person *D.* and without consideration for the acceptance, and were indorsed to the plaintiffs after due; and in another plea, that before the indorsement *D.* was indebted to defendants on the balance of an account in a sum exceeding the amount of the bills:—Held, that the first plea was bad, for not stating that the bill was accepted before it was due; and that the parties had agreed that it should not be negociated after it was due; and that the last plea was bad, because a party to whom a note is indorsed subsequent to its becoming due must recover, notwithstanding any right of set-off possessed by the maker against the indorser arising from matters foreign to the note.

ASSUMPSIT. The first count of the declaration was upon a bill of exchange, dated *22 January* 1833, drawn by one *Apalatequi* upon the defendants, payable six months after date to the order of one *Douglas*, for 230*l.* sterling value in account, and to place the same to account. The declaration then stated the acceptance of the bill by the defendants, and its indorsement by *Douglas* to the plaintiffs. The second count was upon a like bill for 360*l.* with similar acceptance, and indorsed like the bill mentioned in the first count. The third count was on another bill for 200*l.* payable four months after date, accepted and indorsed in the same manner. The fourth count was upon an account stated. The defendants pleaded, first, that *Apalatequi* did not make the bills of exchange mentioned in the declaration. Secondly, to the first, second, and third counts, that the bills were accepted at the request of and for the accommodation of *Douglas*, and without any consideration whatever for the said acceptance thereof, and that they were indorsed to the said plaintiffs after the same and each of them had become due and payable. Thirdly, to the same counts, that the bills were indorsed to plaintiffs by *Douglas* after they were due; and that before that indorsement the said *Douglas* was indebted to the defendants upon the balance of an account between them in a large sum of money exceeding the amount of the bills of exchange. Demurrer to the second and third pleas. Joinder in demurrer.

Barstow for the plaintiffs, supported the demurrer. An important question was probably intended to be

raised on the second plea, viz. to what extent a party sued as acceptor of a bill of exchange must prove a want of consideration for the indorsement to the plaintiff, before he can be called on to show that he gave value for it. Had the plea been sufficient to raise that point, the plaintiffs would have relied on Mr. Justice *Parke's* judgment in *Heath* v. *Sansom and Evans* (*a*). As in most of the cases on the subject the general issue was pleaded, the present question on the plea would not frequently arise before the new rules. A plea assuming to answer the action must affirm and deny every fact necessary to be proved or disproved, in order to destroy the right of action. Now acceptance of a bill, without consideration, and its being indorsed after it became due, are not facts which of themselves afford a defence to an acceptor in an action by an indorsee, without an allegation of fraud, or an averment that the plaintiff did not give a full consideration for it, *Charles and another* v. *Marsden* (*b*). Nothing is averred to show a want of authority to negotiate the bill after due. The last plea is bad, according to *Burrough* v. *Moss* (*c*), which decided that a party to whom a note is indorsed subsequently to its becoming due, must recover notwithstanding any right of set-off by the maker for a debt due to him from the indorser arising out of matters foreign to the note. Now this plea only shows a right of action by defendants against *Douglas*, the indorsee.

PARKE B.—The last plea is certainly bad on the authority of the case cited. The second does not even

(*a*) 2 Bar. & Adol. 291. As to this case, see *Whitaker* v. *Edmunds*, 1 Moody & R. 367. *Patteson* J. *S. C.* in banc, 1 Adol. & E. 638. *Simpson* v. *Clark*, Exch. MS. *June* 6, 1835.

(*b*) 1 Taunt. 224. (N. B. These facts were there specially pleaded.) See *Easton* v. *Pratchett*, *ante*, Vol. IV., and *S. C.* in Error, *post* this Vol. Tria. 1835.

(*c*) 10 B. & Cr. 558.

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aver that the bill was in fact accepted before it became due. Consistently with that plea the bill might have been accepted after due, for the accommodation of the drawer. Nothing shows that the defendants intended to limit its negociation to the period before it became due. Any agreement between the parties not to negociate it after it became due, should have been pleaded, and not left to inference (*a*). The defendant had better amend, and, if he can, plead the facts necessary to oust the right of *Douglas* to indorse the bill after it became due, and at all events, that it was accepted before it became due.

The other Barons concurred.

Hoggins amended on payment of costs.

(*a*) There is no reason why a bill may not be negociated after it is due, unless there was an agreement for the purpose of restraining it. Per Sir *J. Mansfield* in *Charles* v. *Marsden*, 1 Taunt. 225, and per *Lawrence* J. id. 226.

SLOMAN *against* COX.

A bill for 18*l.* was dishonored at maturity, whereupon the indorsee agreed to take from the drawer 8*l.* in cash and another bill for 10*l.*, drawn and accepted in like manner as the first. The second bill was accordingly drawn, accepted and indorsed to the plaintiff, but while it was in the drawer's hands the acceptor, without his knowledge, altered the date of it to a subsequent day:—Held, that as the second bill was vitiated by the alteration, so that it could not be enforced against the drawer, he remained liable for 10*l.* on the original bill.

ASSUMPSIT by the indorsee against the drawer of two bills of exchange. The first count was on a bill for 18*l.*, dated 16th *March* 1833, payable three months after date, drawn by defendant on one *Jones*, and accepted by him, and indorsed to plaintiff. The second count was on a bill for 10*l.*, dated 20th *June*, and payable two months after date, drawn, accepted, and indorsed by the same persons. At the trial before Lord *Lyndhurst* C. B. at the *Middlesex* sittings, it appeared that the first bill for 18*l.* being dishonored at maturity,

plaintiff agreed to take 8*l.* in cash and another bill for 10*l.* &c. The second bill was accordingly drawn, accepted, and indorsed to plaintiff, who thereupon gave up the first bill to the acceptor. After this and during the running of the second bill, but before the defendant had parted with it, the acceptor, without his consent, altered the date from the 20th to the 24th *June*. The plaintiff then called on the acceptor to give him back the first bill, which he did. The jury having found that the second bill was altered, in order to obtain more time to pay it, and without fraudulent intent to vitiate it, the Lord Chief Baron held the plaintiff entitled to a verdict on the first bill for 10*l.* and a fraction for interest. He gave leave to move to enter a nonsuit. A rule was obtained accordingly, and

Platt now showed cause. On the dishonor of the first bill, the plaintiff, as indorsee, called on the defendant, as drawer, to pay it. It was then agreed that on condition of the defendant paying 8*l.* and giving another bill for the remaining 10*l.*, the first should not be enforced. The defendant was to give the plaintiff a good bill for 10*l.*, viz. one on which the plaintiff could sue at law. He has not done so, and it matters not by what circumstance the bill he gave became waste paper, before it came to the plaintiff's hands, for the defendant's engagement, under which the plaintiff gave up the first bill, having been broken, his right to sue on it revived. The verdict is therefore right.

R. V. Richards and *Ball* contrà. The defendant fulfilled his engagement with the plaintiff by drawing a good bill for 10*l.* and delivering it to the acceptor, who was agent for both parties. [*Gurney* B. Could he be the plaintiff's agent for the purpose of destroying the security he held for him?] It was the plaintiff's

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duty to see that he received a valid and unaltered bill, and as the defendant had no knowledge of the alteration of the second bill, he is discharged from liability on the first. The defendant was also affected by the alteration, for as drawer he would not have notice of dishonor for four days later. They mentioned *Gould* v. *Robson* (a), *Newmarch* v. *Clay* (b).

PARKE B.—It is clear that this defendant is still liable to the plaintiff as drawer of the first bill. It being incumbent on him, in the first instance, to see that bill paid at maturity, he shows that by an agreement then made, the plaintiff was to take 8*l.* in cash and another bill for 10*l.* the residue. That bill was accordingly drawn by the defendant, and accepted by *Jones*, but was subsequently vitiated by his alteration, so that it turned out of no value. As the plaintiff therefore has not received from the defendant a bill which can be enforced against him, his liability remains on the first.

ALDERSON B.—If *Jones* was agent for both parties, and gave the plaintiff waste paper instead of a good bill, may not the latter get back the former bill, which he had parted with on the faith of having another available security? The plaintiff retained his right to sue on the original bill. This case is like that of a bill given and afterwards dishonored, which is no payment.

GURNEY B. concurred.

Rule discharged.

(a) 8 East, 576. (b) 14 East, 239.

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WILLIAMS *against* EDWARDS.

Where in a country cause issue was joined in the vacation preceding an issuable term, and no notice of trial was given for the next assizes, judgment as in case of nonsuit may now be moved for in the term next after those assizes.

A Country cause. Issue had been joined in last *Easter* vacation, but no notice of trial was given. A rule for judgment as in case of a nonsuit was obtained in this term.

Knowles showed for cause, that as no notice of trial had been given, the application could not be made till the third term inclusive after issue joined. Here issue was joined in *Easter* vacation, which is not now part of the preceding term by relation. Every pleading is now entitled of the day of month and year when pleaded (*a*).

Rawlinson contrà. If any such rule as that contended for exists in country causes (*b*), this is the third term, for issue was here joined in *Easter* vacation. That, according to the old practice, would have been as of *Easter* term; so that a clear issuable term has elapsed. By the new rules (*c*) the existing practice as to the times of proceeding in the cause is expressly saved; nor need the issue now be entered before making this application (*d*).

PARKE B.—It was certainly unnecessary to enter the issue. Our present impression is, that notice of trial should have been given for the assizes after *Trinity* term, and consequently that the application is not pre-

(a) *Reg. Gen. Hil.* 4 *Will.* 4. No. 1. [*Ante*, Vol. IV. p. i.]

(b) *Baker* v. *Newman*, 1 H. Bla. 123; *Da Costa* v. *Ledstone*, 2 id. 558; appear to have been town causes, without notice of trial given in either.

(c) *Hil.* 4 *Will.* 4. No. 2. [*Ante*, Vol. IV. p. i.]

(d) *Reg. Gen. Hil.* 2 *Will.* 4. No. 70. [*Ante*, Vol. II. 347.]

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mature. We will, however, confer with the other judges.

On a subsequent day he said:—This was a country cause, in which issue was joined in the vacation before last *Trinity* term, and as the new rules did not intend to give further time to proceed to trial than before, we think that the defendant might move for the present rule in this term. It must be made absolute unless a peremptory undertaking is given, in which case it may be discharged.

ALDERSON B.—This was a country cause, in which issue was joined in the vacation before an issuable term, and by the present course of the court the plaintiff ought to have taken down the record for trial at the assizes. Then, as there has been a default, the motion is regular. It would have been different had issue been joined *in* an issuable term (*a*).

(*a*) In *Simons* v. *Falkingham*, *ante*, Vol. L. 501, issue was joined in an issuable term (*Hilary*). The plaintiff did not give notice of trial for the spring assizes next after that term, and it was held too soon to move for judgment of nonsuit in *Trinity* term, S. P. *Miller* v. *Hassall*, cited 1 Tyr. 501 a. In *Prentice* v. *Blott*, 2 Bing. 360, the issue was joined in *Trinity* term in order to go to trial at the summer assizes, but no notice of trial was given for them. The court held that it was premature to move for judgment of nonsuit in *Michaelmas* term. *Hall* v. *Buchanan*, 2 T. R. 734, is a case exactly similar in circumstances, except that a notice of trial had been given in the term next following the assizes; and the court said, "The rule is, that no plaintiff is bound to give notice of trial till the term *succeeding* that in which issue was joined;" so that where issue is joined in a country cause in *Hilary* or *Trinity* terms, notice of trial need not be given for the next assizes, for no motion for judgment as in case of nonsuit can be made till after the second assizes had passed. Tidd, 9th ed. 764; *Wingrove* v. *Hodgson*, *ante*, Vol. IV. 328.

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NURSE *against* GEETING.

Imparlances are put an end to by s. 11. of the uniformity of process act, 2 *Will.* 4. c. 39.

THE plaintiff had declared in the vacation after last term, viz. on 25th *October*, and had afterwards signed judgment as for want of a plea. A rule to set aside the judgment and subsequent proceedings for irregularity was obtained on the authority of *Taunton* J. in *Frean* v. *Chaplin* (*a*). Cause was shown that the case cited could not be sustained; for the uniformity of process act 2 *Will.* 4. c. 39. s. 11. enacts, that if any writ of summons, capias, or detainer, issued by authority of that act, shall be served or executed on any day, whether in term or vacation, all necessary proceedings to judgment and execution may, except as thereinafter provided, be had thereon without delay at the expiration of eight days from the service or execution thereof, on whatever day the last of such eight days may happen to fall, whether in term or vacation.

PARKE B.—I have always considered that imparlances were put an end to by the enactment quoted, and have constantly acted on that impression at chambers; but we will confer with the judges of the King's Bench. On a subsequent day he said:—We have consulted the judges of the other courts, and we are all of opinion that since the uniformity of process act imparlances are at an end, and proceedings, whether in term or vacation, continue their course without them. However, as there is no reason to doubt that the authority cited is correctly stated in the report, the rule may be

Discharged without costs.

Alexander supported the rule, *C. Jones* showed cause against it.

(*a*) 2 Dowl. P. C. 523.

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DIXON *against* LEE and HAWKES.

Two guineas were given to the wife of a publican living sixty miles from *Lancaster*, with a subpœna to attend and give evidence at the assizes held there. She did not at the time complain that the amount was insufficient. She had a sick infant at the breast. Her best route was through *Liverpool*, the inside coach fare from which place was a guinea. She did not attend the assizes. The court refused to make a rule absolute for an attachment, holding that she might reasonably require an inside place out and home, and that two guineas appeared too little for her expenses.

Semble. The affidavit in support of an attachment for not attending a trial in pursuance of a subpœna, need not show that the witness was called in court on it, per *Parke* B.; particularly where it does not appear that he attended the court at all, per *Alderson* B.

CRESSWELL showed cause against a rule nisi for an attachment against *Anne Dixon* for not attending at the last assizes held at *Lancaster*, pursuant to a subpœna. First, the affidavit does not distinctly state that the witness was called on her subpœna, which *Malcolm* v. *Ray* (*a*) shows to be necessary. There, though the crier had indorsed on the subpœna that he had called the witness, the court held that insufficient without the fact being distinctly sworn to on affidavit. [*Parke* B. That case is so much impugned by the subsequent decision of *Barrow* v. *Humphries* (*b*) that it cannot be now considered an authority. *Gurney* B. In many instances after the cause has been called on, the witness has been called on his subpœna before the jury are sworn, in order to withdraw the record if he should not appear (*c*). *Alderson* B. In *Malcolm* v. *Ray* the witness had been in court, so that the court might have thought it necessary to call him when wanted. There may be a distinction between a witness who attends the court in pursuance of his subpœna, and one who stays away in disobedience to it. It might be of use to call him in the one case, though fruitless in the other.] Secondly, the affidavits show that the witness was wife of a publican living at *Rainhill*, sixty miles

(*a*) 3 B. M. 222; S.C. not S. P. *id.* 579, nomine *Day* for *Ray*.

(*b*) 3 B. & Ald. 598.

(*c*) See *Hopper* v. *Smith*, M. & M. 115; *Mullett* v. *Hunt*, *ante*, Vol. III. 875. In *Aitkens* v. *Howell*, cor. *Taunton* J. *Guildhall*, 10th *May* 1832, this course was taken in an undefended cause, which was suffered to keep its place in the paper.

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from *Lancaster* and eleven from *Liverpool*. As there was no direct coach conveyance from *Rainhill* to *Lancaster*, her readiest way was to go round by *Liverpool*, the inside coach fare from whence was a guinea. She would have had to stay three days at *Lancaster* with a sick infant at the breast. She received two guineas conduct money, which is not sufficient. Before she could be called on to set out she should have received sufficient for her journey, her stay, and her return.

Alexander, contrà. The witness kept the money, without complaining at the time she received it that it was too little for the purpose.

Per Curiam.—The witness should have objected to the amount as insufficient at the time it was so paid her. But under her circumstances at the time, and in her station of life, she might reasonably require an inside place. Two guineas would not be sufficient for her expenses out and home. The master would allow whatever sum was paid for them, not exceeding sixpence a mile. Under the circumstances an attachment ought not to issue.

Rule discharged, but without costs.

LESLIE *against* DISNEY.

The officer of arms called *Somerset* herald, being arrested on mesne process, the court refused to discharge him on motion, as a king's servant.

THE defendant's affidavits stated that he held the office of *Somerset* herald by letters-patent, with livery and a fixed salary from the king, and that he was liable to be called on to attend his majesty at any time. The defendant swore he considered himself to be one of the king's servants in ordinary. In 1693 the House of Lords affirmed the privilege from arrest claimed by

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Windsor herald (*a*). The arrest was on the 8th, and on the 20th a rule was obtained for discharging the defendant out of custody, on the ground of privilege as a king's servant. Cause was shown that the application was too late; that the defendant is not an officer whose duty is actually to attend the king; and that the crown did not interfere, *Fisher* v. *Begrez* (*b*).

Per Curiam.—The question whether *Somerset* herald is entitled to be discharged from arrest by reason of his privilege, ought not to be decided on this motion, or till he shall sue out his writ of privilege. The Court of King's Bench took the same course in *Luntley* v. *Battine* (*c*), on a similar application by a gentleman of the King's Privy Chamber, on the ground, that as he was rarely called on to attend his majesty's person, no inconvenience would follow his being put to that mode of claiming his right. In like manner heralds are only bound to attend on occasions of state ceremonial. A servant in ordinary, means one whose usual duty it is to attend the king.

Kelly supported the rule; *Richards* showed cause.

Rule discharged (*d*).

(*a*) 15 Lords' Journals, 303.
(*b*) *Ante*, Vol. IV. 65.
(*c*) 2 B. & Ald. 234.
(*d*) See *Byrn* v. *Dibdin*, *post*, and *Aldridge* v. *Barry*, 3 Dowl. P. C. 450.

DAVIES *against* JONES.

A writ of summons stated the form of action to be trespass on the case, without indorsement of the sum demanded. The particulars of demand were for wages. They were delivered at the same time with the notice of declaration. As the plaintiff had not declared, the writ was not set aside for irregularity.

CHILTON moved to set aside the writ of summons and proceedings thereon, for irregularity. The writ was in trespass on the case, but the sum demanded

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was not indorsed (*a*). The particulars of demand were delivered with the notice of declaration, and stated 7*l.* to be due to the plaintiff, for wages as a clerk. No declaration had been filed.

Per Curiam (*b*).—Till the declaration shows an irregularity, it cannot be taken that any has been committed. Should a declaration be filed in assumpsit, a variance would appear, and the defendant may then move to set it aside. But the declaration may be in case; and to set aside the writ at present would be to set it aside before the nature of the demand was known.

The rule was afterwards granted on the ground of an irregularity in the notice of declaration.

(*a*) As to this point, see *Perry* v. *Patchett*, *ante*, Vol. IV. 725.
(*b*) Lord *Lyndhurst* C. B., *Parke*, *Alderson*, and *Gurney*, Bs.

PLANT *against* BUTTERWORTH.

Affidavits will not be taken off the file.

AN attorney of *Manchester* had sent up an affidavit of increase, which was filed; and the court refused to suffer it to be taken off the file in order to its being amended in a particular in which a mistake had been made, saying that a fresh affidavit, explaining the mistake, should be sworn and filed.

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The KING *v.* The Sheriff of SURREY, in WESTON *against* WOODS.

In order to set aside an attachment against a sheriff for not bringing in the body, the affidavit should state that the application is made on his behalf, and at his expense, as well as that he is not in collusion with the defendant, by analogy to *Reg. Gen.* of K. B. *M.* 59 *G.* 3.

AN affidavit made on behalf of the Sheriff of *Surrey*, in support of a rule for setting aside an attachment against him, for not bringing in the body on payment of costs, stated "That he was not in collusion with the said *W. W.*, but that the said special bail was put in, and the said *W. W.* surrendered, at the instance of such defendant, for the sole protection of the said Sheriff of *Surrey*, whom this deponent still seeks to protect by this application." Cause was shown that it did not appear from the affidavit, that the application "was made on behalf of the sheriff and at his own expense." The rule of the King's Bench, *Mich.* 59 *G.* 3. (*a*) makes that averment necessary, and seems adopted in this Court; *Price*'s Exch. Pr. App. 157. In support of the rule it was contended, that the affidavit in substance showed that the sheriff was the party on whose behalf the motion was made.

Lord LYNDHURST C. B.—It is better to adhere to the established form of the affidavit required. The present affidavit neither states nor raises the inference that the motion is made at the sheriff's own expense.

The rule was enlarged to give time to produce a proper affidavit at chambers.

C. Jones supported the rule. *Greaves* showed cause.

(*a*) 2 B. & Ald. 240.

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HEMMING *against* ENGLISH.

Where a defendant suffered an incompetent witness to be examined, on the undertaking of the plaintiff's attorney to execute a release to him after the trial, and the plaintiff obtained a verdict, it is no ground for a new trial that the release was not given, but the witness has a remedy on the undertaking.

CASE for negligently driving a gig against and killing the plaintiff's horse. Plea, (before the new rules of pleading) the general issue. At the trial before *Williams* J. at the *Worcester* summer assizes, the plaintiff's only witness to prove the defendant's liability, was the person who was driving the plaintiff's horse at the time of the accident. His testimony being objected to on the ground of interest, stat. 2 & 3 *W.* 4. c. 42. s. 27. was cited, but the learned judge held him to be incompetent. The plaintiff then declared he would release him, but no release stamp being in court, the defendant's counsel suffered the plaintiff to proceed on the undertaking of the plaintiff's attorney that the release should be executed after the trial. The plaintiff obtained a verdict, and his attorney, when called on to perform his undertaking, refused to do so.

Lee moved for a new trial, on the ground of breach of faith and fraud on the court. The evidence was taken on a condition which had not been performed, and should therefore be struck out.

Lord LYNDHURST C. B.—The question is between the defendant and the plaintiff's attorney. The verdict of the jury cannot be affected by the breach of that undertaking to release the witness, in consideration of which he was allowed to give his evidence.

PARKE B.—You import into the case the word "condition." Your whole argument turns on that term being a part of the agreement under which the witness was examined. But there was no such condition in the transaction. The trial was suffered to proceed on

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an attorney's undertaking to give a release, and that undertaking may be enforced by the witness.

ALDERSON B.—The undertaking was for the benefit not of the defendant, but of the witness, who is thereby entitled to be released from any future action by the plaintiff. It is sufficient that the witness gave his evidence on the impression that he was released.

GURNEY B. concurred.

Rule refused.

GLADWELL *against* BLAKE, SWAYSLAND and SOLOMON.

A constable cannot execute the warrant of a judge of the King's Bench, directed to "all constables &c." and not addressed to him by name, in any other district than his own; for stat. 5 *G.* 4. c. 18. s. 6. by which the constable of every parish &c., may execute any warrant of *any justice* &c., within any parish &c., situate within the jurisdiction for which the justice shall have acted in granting it, though not directed to him by name, and notwithstanding the parish in which such warrant is executed is not that for which he shall be constable, is confined to warrants issued by such justices of peace as have only a limited jurisdiction. In trespass against a constable for assaulting and falsely imprisoning the plaintiff, a plea justifying the arrest under a judge's warrant, not directed to the defendant by name, is bad, if it does not state the arrest to have taken place within the defendant's own jurisdiction.

If a constable execute a warrant of a judge of K. B. not directed to him by name out of his own district, and is sued in trespass, no demand need be made of perusal and copy of the warrant, under 24 *G.* 2. c. 44. s. 6.

TRESPASS and false imprisonment. The declaration stated, that the defendants, on the 10th of *December* 1833, with force and arms &c., assaulted the plaintiff, to wit, *in the county of Middlesex*, and with great force &c. pulled and dragged him about, and forced and compelled him to go from and out of a certain church, *situate in the county aforesaid*, into the public street there, and forced and compelled him to go in and along divers public streets to a certain police-office, situate in the county aforesaid, and then and there detained and imprisoned him, and kept and

detained him in prison without any reasonable or probable cause whatsoever. The defendants pleaded, first, not guilty; secondly, that before and at the time of the making of the warrant as thereinafter mentioned, at the sessions of oyer and terminer of our lord the king, holden in and for the county of *Middlesex*, at the sessions house for the said county, on the 2nd of *September* 1833, the plaintiff was and then stood indicted for wilful and corrupt perjury, in his examination as a witness before the Right Honourable *John Singleton* Lord *Lyndhurst*, Chief Baron of his Majesty's Court of Exchequer, in a certain cause, wherein *S. Bloomfield* was plaintiff, and the said *W. Blake*, *E. Cohen*, the said *T. A. Swaysland*, and the said *H. Solomon* were defendants, to which indictment the plaintiff had not then appeared or pleaded; and it had been then and there ordered by the said court, that the plaintiff should enter into recognizance in 200*l.*, with two sureties in 100*l.* each, and that forty-eight hours' notice of bail should be given to Mr. *Spyer*, of No. 30, *Broad Street Buildings*, *London*, solicitor for the prosecution, before the same should be taken. And the defendants, in fact, further say, that before the said time when &c., to wit, on the 10th of *September* 1833, the premises aforesaid having been certified to the Honourable Sir *John Patteson*, knt., one of his majesty's justices of the court of our lord the king, before the king himself, by the clerk of the said session for the said city, the said Sir *John Patteson*, so being such justice, duly made and issued his certain warrant, under his hand and seal, bearing date the day and year last aforesaid, directed to *Thomas Gibbons*, gentleman, tipstaff, or any other tipstaff of his majesty's Court of King's Bench, and to all chief and petty constables, headboroughs, tithing-men, and all others whom the said warrant might concern; and thereby

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willed and required, and in his majesty's name strictly charged and commanded them, and every of them, on sight thereof, to apprehend and take the body of the plaintiff and bring him before the said Sir *John Patteson*, or one other of the judges of the said Court of King's Bench, if taken in or near the cities of *London* or *Westminster*, if elsewhere, before some justice of the peace near to the place where he should be therewith taken, to the end that the plaintiff might become bound, and also find sufficient sureties for his personal appearance at the next session of the peace of our lord the king, to be holden in and for the county of *Middlesex*, to answer to the said indictment according to the due course of the said court, and to be further dealt with according to law; and the defendants further say, that afterwards, and before the said time when &c., to wit, on the day and year last aforesaid, in the county aforesaid, the said warrant was delivered to the said *H. Solomon*, who then, and from thence, and until and at the said time when &c., was a constable and peace officer in and for the county of *Sussex*, in due form of law to be executed; by virtue of which said warrant he the said *H. Solomon*, so being such constable and peace-officer as aforesaid, and the said *W. Blake*, and *T. A. Swaysland*, in his aid and assistance, and by his command, afterwards, to wit, at the said time when &c., that is to say, on the day and year last aforesaid, gently laid their hands on the plaintiff, in order to apprehend and take, and did then and there apprehend and take the plaintiff into the custody of the said *H. Solomon*, until the plaintiff afterwards, and as soon as conveniently could be, was carried and taken to and before the said Sir *John Patteson*, for the purposes aforesaid, in and by the said warrant specified; and under and by virtue of the same, and on the occasion aforesaid, the plain-

tiff was necessarily and unavoidably forced and compelled by the defendants to go from and out of the said church into the said public street there, and was also forced and compelled by them, the defendants, to go in and along the said public street to the said police-office, and was also necessarily and unavoidably imprisoned, and kept and detained for the said space of time in the said declaration mentioned, which are the said supposed trespasses in the said declaration mentioned, and whereof the plaintiff hath complained against them.

To this plea the plaintiff (after protesting that he did not stand indicted for perjury, and that it had not been ordered by the court of session that the plaintiff should enter into recognizances, the warrant of Mr. Justice *Patteson*, and that the other defendants acted in aid of the defendant *Solomon*,) replied, that the defendants of their own wrong, and without the residue of the cause in the second plea alleged, committed the trespasses in the declaration mentioned.

The cause was tried before Lord *Lyndhurst* C. B. at the *Middlesex* sittings after last *Trinity* term. The arrest was shown to be in *Middlesex*. The plea was established in evidence, and the defendant *Solomon*, to whom the warrant was delivered, was proved to be chief constable of *Brighton* in *Sussex*. The plaintiff did not prove that he had demanded a copy and perusal of the warrant from the defendant *Solomon*, according to *24 G. 2.* c. 44. s. 6. *Ball* for the defendants contended, that the plaintiff should be nonsuited on this ground, or that the verdict should be entered for the defendants under 5 *G.* 4. c. 18. s. 6. The learned chief baron thought that those statutes did not apply, and directed a verdict for the plaintiff, but gave leave to the defendants to move to enter a verdict. The jury gave a verdict for the plaintiff with 40*s.* da-

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mages. *Follett* having obtained a rule according to the leave reserved,

Bompas Serjt. showed cause. No protection is extended to the defendants by 24 *G.* 2. c. 44. s. 6., which only includes warrants under the hands of justices of the peace, and does not apply to bench warrants. It enacts, that "no action shall be brought against any constable, headborough, or other officer, or against any person or persons, acting by his order and in his aid, for any thing done in obedience to any warrant under the hand or seal of any *justice of the peace*, unless demand shall have been made of the perusal and copy of such warrant. [Lord *Lyndhurst* C. B. The difficulty arises on sect. 6. of 5 *G.* 4. c. 18.] That statute contains the same terms as 24 *G.* 2. c. 44. s. 6., without giving power to the defendant, *Solomon*, as a constable of *Sussex*, to execute this warrant in *Middlesex* out of his own jurisdiction. It was passed to remedy inconveniences which it was apprehended might arise within limited jurisdictions, from the state of the law, as ascertained by *Rex* v. *Weir* (*a*). It was there decided, that a justice's warrant, if directed to a constable by name, may be executed by him any where within the jurisdiction of the justice who grants it, but if merely directed to constables by the description of their office, *e. g.* "constables of *W.*" they could not execute it out of the district of *W.* The words of that section (*b*) empowering the execution of any warrant of any "justice or of any magistrate *within*

(*a*) 1 B. & Cr. 288. As to that case, see 2 Hawk. c. 13. s. 30; 1 Salk. 176; 1 Ld. Ray. 546.

(*b*) 5 *G.* 4. c. 18. (passed 31 *March* 1824,) is intituled "an act for the more effectual recovery of penalties before justices and magistrates on conviction of offenders, and for facilitating the execution of warrants by constables." Section 6 is as follows, "and whereas warrants addressed to

any parish &c. situate, lying, or being within that jurisdiction for which such justice &c. shall have acted," cannot refer to the warrant of a judge of the King's Bench who has general jurisdiction over *England* and *Wales*, but to those "magistrates" who have a limited jurisdiction only. It is clear that the term "magistrate" in this act is only used synonymously with "justice of peace," without extending to a judge of the King's Bench, who in granting a bench warrant acts judicially, and is therefore free from responsibility. [Lord *Lyndhurst* C. B. Are the justices of peace at quarter sessions who issue bench warrants within the act 5 *G.* 4., or are they to be considered as judges of a court, and not acting as justices of peace?] It is submitted that they must be viewed in the latter light.

constables, headboroughs, tithing-men, borsholders, or other peace-officers of parishes, townships, hamlets, or places in their characters of and as constables, headboroughs, tithing-men, borsholders, or other peace-officers of such respective parishes, townships, hamlets, or places, cannot be lawfully executed by them out of the precincts thereof respectively, whereby means are afforded to criminals and others of escaping from justice. For remedy whereof be it further enacted, that it shall and may be lawful to and for each and every constable, and to and for each and every headborough, tithing-man, borsholder or other peace-officer for every parish, town, hamlet or place, to execute any warrant or warrants of any justice or justices of the peace, or of any magistrate or magistrates within any parish, town, hamlet, or place situate, lying, or being within that jurisdiction, for which such justice or justices, magistrate or magistrates, shall have acted when granting such warrant or warrants, or when backing or indorsing any such warrant or warrants, in such and the like manner as if such warrant or warrants had been addressed to such constable, headborough, tithing-man, borsholder, or other peace-officer specially by his name or names, and notwithstanding the parish, town, hamlet or place in which such warrant or warrants shall be executed, shall not be the parish, township, hamlet or place for which he shall be constable, headborough, tithing-man or borsholder, or other peace-officer, provided that the same be within the jurisdiction of the justice or justices, magistrate or magistrates, so granting such warrant or warrants, or within the jurisdiction of the justice or justices, magistrate or magistrates, by whom any such warrant or warrants shall be backed or indorsed."

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The warrant directs the plaintiff to be brought before as judge of the King's Bench, if taken within London and Middlesex; but if elsewhere, before as justice of peace. A judge of the King's Bench is a conservator of the peace, but that character is distinct from the office of justice of peace, and subordinate to his office of judge. The authority possessed by them in that character was exercised on this occasion. Looking at the terms of the act, the mere circumstance of extending the words "justices" or "magistrates" to persons of a higher degree. Thirdly, the plea is bad, because if a verdict should be entered for the defendants, it would be no answer to the action, and the plaintiff would still be entitled to judgment non obstante veredicto.

Follett contra. It is stated in the plea that a true bill had been found against the plaintiff for perjury. Then it is submitted that any justice of peace had power to issue a warrant to hold him to bail for such an offence (*a*), and in granting the warrant in question the judge acted on his common law authority as a conservator and justice of peace throughout the kingdom. For no distinction, material to this argument, exists now between conservators and justices of the peace, since the election of the former was given to the crown by 1 *Ed.* 3, c. 16; the latter appellation being said to be the more honourable, and acquired at the time that 34 *Ed.* 3, c. 1. empowered them to try felonies (*b*). The words of 5 *G.* 4. are extensive enough to include not only justices of the peace, but every magistrate. Then how can a judge of the court of King's Bench be excluded from its purview? It would be equally useful in cases of escape that a constable

(*a*) See on this subject, 1 Chit. Crim. Law, 13.

(*b*) [illegible]

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of one county should pursue and take the offender in another, under the warrant of a judge, as under a warrant of a justice backed by another justice of the latter county. [*Alderson* B. Had this warrant been directed to the constable by name, no doubt could have arisen as to his power to execute it, for *Rex* v. *Weir* set that at rest.] *Gimbert* v. *Coyney and another*(a) decided, that warrants addressed to peace-officers in their official character, are placed by 5 *G.* 4. c. 18. s. 6. on the same footing on which those addressed to them by name previously stood. This warrant being directed to all constables, the defendant *Solomon* was duly authorized to execute it in *Middlesex*. It may be that the statute embraces warrants which are backed by justices in the usual way; it may also apply to cases like the present, where such indorsement is not necessary. Secondly, the plaintiff cannot move to enter up judgment non obstante veredicto. For, in order to insist on the above point, he should have replied that the warrant was executed in *Middlesex*, and that *Solomon* was not a constable of that county; for this being a transitory action, and the plaintiff not being bound to prove an imprisonment in *Middlesex*, though so laid in the declaration, the arrest, for all that appears on this record, may have taken place in the very parish in *Sussex* of which he was constable. Thirdly, the constable was as much entitled to the protection of 24 *G.* 2. when acting as he was bound to do in executing a warrant of a judge of the King's Bench within the extended jurisdiction possessed by that magistrate, as if he had been executing a warrant of any other justice. Nothing in the act confines it to persons who are justices of peace, and no more.

Lord LYNDHURST C. B.—Having considered the

(a) Mscl. & Younge, R. 469.

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clauses of 5 *G.* 4. c. 18., I am satisfied that the legislature never intended it to apply to the judges of the King's Bench, but only to persons having authority as justices of peace within the limited jurisdictions there expressed. I am also of opinion that no demand of a perusal and copy of the warrant was required by 24 *G.* 2. c. 44. The plaintiff therefore must have judgment, notwithstanding the verdict is to be entered for the defendants on the special plea.

PARKE B.—It is clear that had not the framers of 5 *G.* 4. c. 18. merely contemplated justices of peace possessing a limited jurisdiction, they would have expressly mentioned judges of the King's Bench. That act does not extend the power of constables beyond what they previously had under a bench warrant directed to "all constables within" the county named (*a*). *Rex* v. *Weir* shows, that in cases to which 5 *G.* 4. c. 18. does not apply, the constable's authority is confined to his own district, unless the name be inserted in the warrant which he executes. The plea having been established in evidence, a verdict must be entered for the defendants; but the plea is substantially defective at law, for not averring that the constable *Solomon* made the arrest in *Sussex*, viz. within his jurisdiction as such constable. The consequence is, that the plaintiff is entitled to judgment non obstante veredicto. A perusal and copy of the warrant need not be demanded, where, as in this case, the officer does not act within his jurisdiction in obedience to the warrant.

ALDERSON and GURNEY Bs. concurred.

Verdict entered for the plaintiff, with 40*s.* damages

(*a*) See form of bench warrants, 4 Chit. Cr. Law, 198.

on the general issue; for the defendant on the special plea (which went to the whole declaration); and judgment for the plaintiff non obstante veredicto.

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LAMBERT *against* WRAY.

An affidavit of debt, grounded on a covenant by deed to pay a certain sum at a day named, is good, if it state the defendant to be indebted to the plaintiff upon and by virtue of the indenture in the said sum of &c. "at a day now passed," without alleging it to be due and unpaid.

MOTION by *Humfrey* to discharge defendant out of custody on entering a common appearance, on the ground that the following affidavit to hold to bail did not show that the money due was not paid on the day, or that it still remained due. The defendant was alleged to be indebted to the plaintiff in a sum stated, "upon and by virtue of a certain indenture made between &c., whereby the said *T. W.* did covenant and agree that he the said *T. W.* and his wife, his executors &c., or some or one of them, should and would well and truly pay or cause to be paid to the deponent the said sum of &c., with lawful interest for the same at the rate of 5*l.* per cent. per annum, at a day now passed."

PARKE B.—The affidavit is sufficient. It describes the indenture to be for the payment of a certain sum at a certain day now passed, and states that the defendant is indebted to the plaintiff in the amount. He could not be "indebted" if the time for payment had not elapsed, or the money had not remained due (*a*).

ALDERSON and GURNEY Bs. concurred.

Rule refused.

(*a*) As to the point, whether the allegation that the defendant is

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"indebted" to the plaintiff, has the effect of curing an affidavit which is otherwise erroneous, see *Brooke* v. *Coleman*, *ante*, Vol. III. 595. Also, per *Bayley* J., 2 M. & S. 149; per *A. Park* J., 7 Bing. 279; 7 Taunt. 171; 4 Bing. 142.

As to arrest for amount of bill and interest thereon, see *Cullum* v. *Leeson*, *ante*, Vol. IV. 266.

PHILLIPS *against* TURNER.

An affidavit to hold to bail, stating that defendant was *indebted*, &c. on a bill accepted by him, and payable *at a day now passed*, is sufficient, without alleging expressly that the bill was unpaid or dishonored.

THE affidavit to hold to bail stated "that the defendant was indebted to the plaintiff on a bill drawn by *A. B.* upon the defendant, and accepted by him, payable to *A. B.* at a day now passed, and by the said *A. B.* indorsed to *E. F.*; and by *E. F.* indorsed to the plaintiff," without expressly alleging that it was unpaid or dishonored; and *Garney* B., after consulting the other barons, said, "The rest of the Court agree with me that this affidavit is sufficient."

Miller moved.

SAUNDERS *against* POPJOY.

The affidavit filed of country bail, at a judge's chambers, was incorrect, but that upon which the motion was made to justify them was right:—Held, that they were entitled to justify without the defendant's either receiving or paying costs.

THE justification of country bail was opposed, on the ground that their affidavit stated each of them to be *possessed* of property to a certain amount, without further stating each of them to be *worth* double the sum for which the defendant was held to bail above his own just debts, or every other sum for which he might be then bail, according to *Reg. Gen. Hil. 2 Will. 4.* No. 19 (*a*). In support of the bail, after admitting that the error existed in the affidavit filed at chambers, it was claimed to justify on a correct affidavit.

(*a*) *Ante*, Vol. II. 342; *Rogers* v. *Jones*, Vol. III. 256.

Per Curiam. (*Parke, Alderson,* and *Gurney* Bs.)—The bail may justify. The defendant will neither receive nor pay any costs.

R. V. Richards for, *C. Jones* against the bail.

See *Batley v. Heald, post, Hil.* 1835.

JOHNSON *against* BUDGE.

A cause was in the paper for a sitting in term, which begun on the 17th and was adjourned to the 19th. On the 18th, and before the case was tried, the defendant died. (17 *C.* 2. c. 8.) The Court refused to allow the trial to take place on the last day of the term; and said they could not interfere to direct it to be tried after the term and to enter the verdict as of a sitting in it.

THIS cause was in the paper for trial at a sitting day in term, *Monday* the 17th *November*. The sitting began on that day, and was adjourned to *Wednesday* the 19th *November*. In the interval the defendant died, viz. on the night of *Tuesday*. On the *Wednesday* *Platt* applied to the judge then sitting at nisi prius to adjourn the sittings to some other day in term, so that it might still be tried within the term. *Bolland* B. accordingly adjourned the sitting to the last day of term, subject to the approbation of that course by the court upon application. On the 20th

Platt moved that the cause might be tried on the last day of this term, or on some later day as of the term. The plaintiff might have the fruits of a verdict if obtained at any time during the sitting; and posteas are made up of the first day of the sitting after term. The defendant was then living. An adjourned second sitting is in fact that second sitting.

PARKE B.—There will be a great difficulty in either course. The posteas of cases tried at a sitting in term must be made up of the day on which they are actually

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tried (a). No cases can be expected to apply, for the adjournment of a sitting in term is of very recent occurrence. The trial must not take place on the last day of term, to the hindrance of the course of public business on that day; but it may be taken after term, by consent.

Hoggins and *Wortley*, who had been counsel for the defendant in the cause, refused to consent; upon which the *Court* said they could not interfere.

(a) See *Taylor* v. *Harris*, 3 B. & P. 550, acc. *Jacobs* v. *Miniconi*, 7 T. R. 81.

LEWIS *against* DAVISON.

It is too late to object to the indorsement on a capias, for variance from the form given by the uniformity of process act, 2

RULE for setting aside the writs of capias, exigent, and proclamations, and other proceedings to outlawry against the defendant in this cause, for irregularity, with costs, on entering a common appearance. On showing cause, on the 20th *November*, the *Court*, after consulting the officer, said that the rule was irregular,

W. 4. c. 39. Sched. No. 4. where the writ might have been seen at the filacer's office on 4th *June*, but no application was made till late in *Michaelmas* term to set aside an outlawry to which the plaintiff had proceeded in the meantime, notwithstanding the defendant swore that the outlawry was not known till six weeks before; for the irregularity in the writ, if any, should have been previously objected to on summons at chambers.

A writ, issued on 17th *April*, was returned non est inventus on 4th *June*, without a judge's order authorizing the sheriff to make such a return before the four months expired:—Held, that as the judge's order need not be stated in the writ, it must be assumed that the return was regularly obtained.

An exigent is not a "writ" within 2 *W.* 4. c. 39. s. 12. Per *Parke* B.

Where an exigent directed one of the proclamations to be made at the parish church of the parish in which the defendant resided,—Held, that the 31 *El.* c. 3. s. 1. directs no particular form for the writ of exigent, and as it was not sworn that there was any nearer church or chapel than the parish church, the exigent was sufficient, though it did not state that the parish church was the nearest to the defendant's residence.

A man having a house and office may describe himself *of* the office; per Lord *Lyndhurst* C. B.

and should have been drawn up on reading the original writ. They enlarged it in order to amend and re-serve the original rule, the defendant paying the costs of the plaintiff's appearance by counsel. On a subsequent day,

Mansel in support of the rule, stated several objections. The plaintiff had sued out the writ in person, and it was thus indorsed:—"This writ was issued by *Charles Lewis*, of No. 6, *Bernard Street, Brunswick Square*, the plaintiff within named, in person;" whereas the form of indorsement given by 2 *Will.* 4. c. 39. sched. 4. is—"This writ was issued in person by the plaintiff within named, *who resides at* —— [*mention the city, town or parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence, if any such there be.*]"—*Price's* Exch. Pr. 111. [*Parke* B. The question is, whether this description of the plaintiff's residence is not in substance the same as that required by the form. The act must, however, be strictly complied with.] In *Smith* v. *Crump* (*a*), *Parke* J. says—"The statute provides the form in which the writ of summons is to be framed; and if the parties will not take the trouble to look at the act before they proceed, they must take the consequences." [*Alderson* B. This is only an irregularity which does not avoid the writ. Lord *Lyndhurst* C. B. The writ is not void. We are informed by the filacer that it was filed, and might have been seen in his custody on and after the 4th *June* last. The defect, if any, has been known to the defendant for six weeks, as he admits. He might have applied to a judge, and so obtained leave to see it at the sheriff's office and take a copy of it.] That could not be done while the writ was unexecuted. [Lord *Lyndhurst* C. B. A man who has a house and an office might properly describe himself "of" the

(*a*) 1 Dowl. P. C. 519.

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his residence. The application was made too late to set aside the writ. *Alderson* B. It should have been made long ago at chambers. Secondly, The writ was returnable before the last day of Hilary term, viz. the 4th of April, without any order of a judge authorizing the sheriff to make a warrant. Such order might have been obtained on affidavit that the defendant is a foreigner. [Lord *Lyndhurst* C. B. If a judge's order was requisite, it has not been referred to in the writ. In the absence of proof to the contrary, we must presume the proceeding to be regular. The exigent is tested on the return of the capias. The day and hour on which it is filed should be indorsed by the officer. *Reg. Gen. H. 2 Will. 4.* [illegible] *Hilary* Vacation, 1832. The record was not filed until the 16th, but a writ was filed till the 18th, in order to complete the record, so that the exigent dated the 17th may be considered as issued on the 18th. *2 Will. 4. c. 39.* s. 1. requires every writ to be tested on the day it issues. [Lord *Lyndhurst* C. B. An exigent is not issued in pursuance of that act, so that this may have been regularly issued on the 18th, tested on the 17th. *Parke* B. The word "writ," in ~~sect. 12, refers to the~~ process by writ of summons, &c. provided by the act. Sect. 5. keeps process in outlawry as it was before.] Fourthly, The writ directs the proclamation to be made at the parish church without showing that it was the nearest church to the defendant's residence, with the [illegible] irregularity on two grounds: first, that the issue did not state the defendant's residence; secondly, that the "*Birmingham*" was sufficient description of the place of the plaintiff's attorney to satisfy *24 Geo. 2. c. 44. s. 1.* in case of the form of action is not now required to be stated in the issue, it should not be inserted in it.

The form of issue directed by Reg. Gen. Hil. 4 W. 4. Form No. 1. should contain the date of the pleadings, but not the form of action.

(a) 3 B. & P. 551. (b) Tidd, 9th ed. 39.

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Parke B. The act 3 *Will.* 4. c. 39. is in more precise terms. Lord *Lyndhurst C. B.* The act 3 *Edw.* 3. c. 3. requires that one of the proclamations shall be made at or near the usual door of the church or chapel of the town or parish where the defendant was living at the time of the exigent awarded, and if the defendant shall be dwelling out of any parish, then in such place as some one of the parishes in the same county and next adjoining to the place of the defendant's dwelling. The objection cannot be entertained; for the act does not prescribe any precise form for the writ, and the mandate will be, that there was no mother church or chapel. That being so, we must presume the proclamations to have been made according to the act. The sheriff may not know that there was no chapel in the parish. Take the defendant's time to put in special bail, and make the rule absolute for setting aside the proceedings on payment of costs, and taking short notice of trial.

Rule accordingly.

Doubt. Sergt. moved to set aside the issue in this case, with the notice of trial indorsed thereon, for irregularity on two grounds: first, that the issue did not state the form of action or the date required by the form provided by *Reg. Gen. Hil.* 4 *W.* 4. No. I. [*See Vol. IV.* p. 1.] Secondly, the issue was insufficient, description of the plaintiff's attorney to satisfy 21 *Geo.* 2. c. 19. s. 1. in the issue, it should not be inserted in it.

The form of issue directed by *Reg. Gen. Hil.* 4 *W.* 4. Form No. I. should contain the dates of the pleadings, but not the form of action.

Parke B.—As the form of action is not now required to be stated in the issue, it should not be inserted in it.

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But as the dates are required by the form No. 1. to be inserted, the rule must be granted on that point; but the party will obtain leave to amend, and we will not suffer the rule to be a stay of proceedings.

REYNOLDS *against* WELSH.

The recital of the writ in the commencement of a declaration is unnecessary, so that if in a writ so set out the plaintiff sues as assignee, and then proceeds to state a bond made to himself, the variance affords no ground of demurrer.

DEBT on bond. The declaration commenced thus: —" *S. R.* assignee of *S. W.* esq. and *J. H.* esq. sheriff of the county of *Middlesex* &c., complains of the defendant, who has been summoned to answer the said *S. R.* assignee &c. as aforesaid &c." It then alleged a bond made to the plaintiff himself. Demurrer assigning for cause that the plaintiff had declared as assignee of the sheriff, on a bond afterwards alleged to be executed to himself, without showing assignment by the sheriff. Joinder. In support of the demurrer it was said, that the description of the plaintiff was not surplusage, as he ought to be bound to sue in his representative character only. *Per Curiam.* The recital of the writ in the declaration being unnecessary (*a*) may be rejected as surplusage. Judgment for the plaintiff. *Channel* supported the demurrer, *Barstow* the declaration.

Parke B. added—In another demurrer in the paper, *Hargreave* v. *Holden*, the plaintiffs have commenced the declaration stating themselves to be executors, and then state a cause of action accruing to themselves. There is a case in *Ventris* (*b*) which expressly shows the commencement may be treated as surplusage. Demurrer overruled and judgment for plaintiff.

Cowling was to have argued for the plaintiff.

(a) See 1 Saund. 318.

(b) *Hervey, administrator*, v. *Dimocke*, 1 Ventris, 119. See 1 T. R. 488; Hobart, 288.

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Earl of LONSDALE *against* WHINNAY.

A party having a claim to payment of a sum of money under an award, must elect whether to proceed on it by action, or to move for an attachment. An attachment had issued for non-payment of a sum which by an award the defendant was directed to pay, but though able, refused to do so, saying, he had rather go to gaol, which he accordingly did. The plaintiff then sued him on the award. The court discharged the defendant, on the terms of giving a bond to the plaintiff, with sureties to the master's satisfaction, conditioned as in the case of a recognizance of bail.

AN award had been made in the plaintiff's favour for 348*l.*, and, after making the submission a rule of court, an attachment was granted, upon which the defendant went to prison. The plaintiff having afterwards brought an action on the award, a rule was obtained by the defendant calling on the plaintiff to show cause why that action should not be discontinued or stayed, on payment of costs by the plaintiff to the defendant, or why the defendant should not be discharged out of custody.

Coulthay showed cause. Before the attachment was applied for, amicable applications were made to defendant to pay; but, though well able to do so, he declared he would rather go to gaol than pay. The award will be rendered fruitless by his obstinacy, unless the plaintiff can sustain the action and procure execution against his effects. The court will not interfere, unless the plaintiff by taking both remedies, without reason for doing so, has inflicted unnecessary hardship on the defendant. [*Parke* B. The plaintiff must make his election between attaching the defendant on the award or suing him, and cannot take two distinct remedies on it. No case decides that the plaintiff is to be put to his election only when he has acted unreasonably or vexatiously in suing on the award after obtaining the attachment. The general rule is, that had the action been brought first, the defendant could not be attached afterwards.] The remedies are not inconsistent; one being of a criminal nature against the person, the other civil against his effects, and not necessarily involving the person: and it is no where held, that whatever the circumstances of the case may be, the plaintiff shall in

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every event be put to his election, and may not enforce both remedies. The plaintiff has not here been guilty of vexation, for the defendant is in the same condition as if he had been arrested in an action on the award, and had then chosen to remain in custody, without putting in bail or paying the demand. If the defendant is unconditionally discharged, without being called on to put in bail, or pay into court the sum awarded, the opportunity of arrest will be lost to the plaintiff. If the plaintiff had arrested the defendant, or if, after proceeding to judgment in the absence of this motion, he had taken him in execution, as was done in *Richards* v. *Clancey* (a), the defendant might have had a right to his discharge without being made subject to any terms, for the inconsistency in proceeding against the defendant's person by two ways. The distinction between that course and the merely proceeding simultaneously against his person and property, seems supported by the ancient authorities, *Anonymous* (b), *Webster* v. *Bishop* (c). In *Stock* v. *De Smith* (d) Lord *Hardwicke* said, "So in the case in 1 Salk. 73, no action was depending when the attachment was granted, though in that case I should have thought it considerable (e) whether when he had got bail to this action the court should not have stopped the attachment; but, however, the attachment there was granted before any action was brought."

Dundas contrà. The present rule of law on the subject is thus correctly laid down by Mr. *Tidd* (f), who collects the decisions:—"Upon a submission being made a rule of court, it was formerly holden, that the party might proceed both by action and attachment at the same time; but a different doctrine has been since

(a) 1 Barnard. 386.
(b) 1 Salk. 73.
(c) 2 Vern. R. 44.
(d) Cas. t. Hardw. 106.
(e) See in C. t. H.
(f) 9 ed. 833.

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laid down, and accordingly, in a late case, viz. *Badley v. Loveday* (a), the court of Common Pleas would not grant an attachment for non-performance of an award pending an action brought on it, nor would they allow the plaintiff to waive the action, in order to apply for an attachment." The defendant is, therefore, entitled to be discharged without condition, the plaintiff having made his election to proceed by attachment.

Per Curiam (b).—The plaintiff must be put to his election without calling on the defendant to pay the plaintiff's costs of the attachment. The remedy by action is a matter of right, but that by attachment is a matter in our discretion, and we should withdraw the permission we have given to issue it (c). The action may proceed, but the defendant may be discharged on giving a bond to the plaintiff with sureties to the satisfaction of the master, conditioned in the same manner as if it were a recognizance of bail. There would be difficulty in requiring such a recognizance, as there is no affidavit to hold to bail.

Rule accordingly (d).

(a) 1 B. & P. 81. (b) Parke, Bolland, Alderson, and Gurney, Bs.
(c) See Tidd, 9 ed. 835. (d) See *Paull v. Paull, ante*, Vol. IV. p. 78.

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The ATTORNEY-GENERAL *against* VONDIERE.

The act for the general regulation of the customs, 3 & 4 *Will.* 4. c. 52., enacts by s. 20., that goods taken or delivered out of *any warehouse*, not having been duly entered, shall be forfeited: Held, that a king's warehouse, as ascertained by s. 119. of that act, is a "warehouse" within that section.

By s. 28. of the Smuggling Prevention Act, 3 & 4 *Will.* 4. c. 53., if goods which shall have been warehoused "*or otherwise secured* for home consumption or for exportation, shall be clandestinely removed from or out of *any warehouse* or place of security," they shall be forfeited.

Quære, whether a king's warehouse, as ascertained by s. 119. of 3 & 4 *Will.* 4. c. 52., in which goods have been deposited for security of duties, is within s. 28. of 3 & 4. *Will.* 4. c. 53?

INFORMATION in rem on statutes 3 & 4 *Will.* 4. c. 52. s. 17. & 20., and on c. 53. s. 28. The first count alleged that *W. P.* and *J. F.* officers of customs, after 28th *August* 1833, and before the day of exhibiting the information, to wit, on 4th *September* 1833, did seize and arrest to the use of his majesty and of themselves as forfeited, several parcels of silk waistcoats &c. of the goods and chattels of persons unknown, for that divers merchants, whose names are as yet to the said Attorney-General unknown, did heretofore, to wit, on &c., import or cause to be imported into the united kingdom, to wit, at &c., 132¼ ells of velvet &c., the said goods and merchandize being at the time of the said importation thereof liable to the payment of duties of customs to his majesty; and that the said goods and merchandizes were afterwards deposited and secured by certain officers of the customs *for security of such duties*, in a certain warehouse in the united kingdom, that is to say, in *London*, commonly called *the king's warehouse* at the custom-house; and that the said goods and merchandize so deposited and secured in such warehouse for the security of such duties, were afterwards, and without the payment of the duties of customs thereon, by certain persons unknown, clandestinely and illegally removed from and out of the said warehouse where the same had been so deposited and secured as aforesaid, contrary to the form of the statute &c., whereby and by force of the said statute the said goods and merchandize became forfeited. The second count alleged that the goods and merchandize so depo-

sited in the king's warehouse, were by certain persons unknown taken and delivered out of such warehouse where the same had been so deposited and secured, *without having been duly entered*, against the form of the statute, &c. The third count alleged that the goods were unshipped by certain persons unknown from a certain vessel, the customs and other duties not being first paid or secured, against the form of the statute &c. The conclusion was a prayer of condemnation. At the trial before *Alderson* J. at the sittings after *Trinity* term, the crown obtained a verdict on the first and second counts.

Jervis moved in arrest of judgment. In order to support the first count it must appear that the place in which the goods were deposited was "a warehouse or place of security" within the meaning of 3 & 4 *Will.* 4. c. 53. s. 28 (*a*); upon which enactment, as well as 3 & 4

(*a*) Enacting, "that if any goods liable to the payment of duties shall be unshipped from any vessel or boat in the united kingdom or the *Isle of Man*, customs or duties not being first paid or secured; or if any prohibited goods whatsoever shall be imported into any part of the united kingdom or of the *Isle of Man*; or if any goods whatsoever which shall have been warehoused or otherwise secured in the united kingdom, *either for home consumption or exportation*, shall be clandestinely or illegally removed from or out of any warehouse or place of security; then and in such case all such goods as aforesaid shall be forfeited, together with all horses and other animals, and all carriages and other things made use of in the removal of such goods."

3 & 4 *Will.* 4. c. 52. s. 17. is as follows: "And be it enacted, that every importer of any goods shall, within fourteen days after the arrival of the ship importing the same, make perfect entry inwards of such goods, or entry by bill of sight in manner hereinafter provided, and shall within such time land the same: and in default of such entry and landing, it shall be lawful for the officers of the customs to convey such goods to the king's warehouse; (then follows power to remove to the king's warehouse small quantities of goods left after rest of cargo discharged:) and if the duties due upon any goods conveyed to the king's warehouse shall not be paid within three months after such fourteen days shall have expired, together with all charges of removal and warehouse rent, the same shall be sold, and

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Will. 4. c. 52. s. 17., that count rests. The statutes contemplated warehouses in which a merchant has a right to deposit, and from which he has also power to remove goods under the warehousing laws (*a*) without payment of duty. Now the king's warehouse is not such a "warehouse," but a place provided by the crown for lodging goods in for security of customs duties. Such a deposit, quoad the merchant, is in invitum. That distinction appears from s. 119. of 3 & 4 *Will.* 4. c. 52. (the interpretation clause), which enacts that the term "warehouse" shall be taken to mean any place, whether house, shed, yard, timber-pond, or other place in which goods entered to be warehoused upon importation, may be lodged, kept, and secured, without payment of duty, or although prohibited to be used in the united kingdom; and that the term "king's warehouse" shall be construed to mean any place provided by the crown for lodging goods therein for security of the customs. Again, 3 & 4 *Will.* 4. c. 53. s. 28. provides that "if any goods whatever, which shall have been warehoused or otherwise secured in the united kingdom, *either for home consumption or for exportation*, shall be clandestinely *removed out of* any warehouse or place of security &c.," thus clearly showing that such warehouse or place of security must be such as the goods can be warehoused in "for home consumption or exportation." Now goods are not lodged in the king's warehouse for either of those purposes, or by or on the merchant's account, but by the king's officer for security of the customs.

[Lord *Lyndhurst* C. B. It is clear that no merchant who imports goods in order to warehouse them for

the produce thereof shall be applied, first, to the payment of freight and charges, next, of duties; and the surplus, if any, shall be paid to the proprietors of the goods."

(*a*) 3 & 4 *Will.* 4. c. 57. repealing all preceding warehousing acts.

exportation without payment of duty, or for home consumption, can enter or deposit them in a warehouse falling within the description of a king's warehouse. But these goods were deposited by an officer of customs in a king's warehouse in order to secure payment of duty thereon by preventing their removal till such payment should be made. Then if, after being so deposited, they must pay duty at all events, or be sold after the lapse of time allowed by 3 & 4 *Will.* 4, c. 52, s. 17, must they not be taken to be so lodged for home consumption? For the merchant might on payment of duty obtain possession of them for that purpose within the period fixed by that section, and the act of lodging them there by the officer is constructively his, as by making default in paying duty on them, or warehousing them under the laws for that purpose, he in fact permitted them to be so deposited.]

The first count does not show that the goods were entered in any warehouse or secured "either for home consumption or exportation," but merely states that they were deposited for security of duties.

The second count is bad for the first reason, viz. that these goods were not taken out of any "warehouse" falling within stat. 3 & 4 *W.* 4, c. 52, s. 20, on which that count is framed. That section is as follows: "And be it enacted, that no entry nor any warrant for the landing of any goods, or for the taking of any goods out of any warehouse, shall be deemed valid, unless the particulars of the goods and packages in such entry shall correspond with the particulars of the goods and packages purporting to be the same in the report of the ship, and in the manifest, where a manifest is required, and in the certificate or other document, where any is required, by which the importation or entry of such goods is authorized: nor unless the goods shall have been properly described in such entry by the denominations and with

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the characters and circumstances according to which such goods are charged with duty or may be imported, either to be used in the united kingdom or to be warehoused for exportation only; *and any goods taken or delivered out of any ship or out of any warehouse*, or for the delivery of which, or for any order for the delivery of which from any warehouse demand shall have been made, not having been duly entered, shall be forfeited."

Lord LYNDHURST C. B.—The second count is clearly good, so that as the verdict may be entered for the crown on it, it is unnecessary to inquire whether the first could be supported. Our only doubt as to that count was, whether the purpose for which the goods were deposited in the king's warehouse must appear, and if it must, whether it was correctly stated?

PARKE B.—The second count, framed on 3 & 4 *Will.* 4. c. 52. s. 20., is good. That section mentions generally "any warehouse;" and it is immaterial whether the warehouse in which they were lodged was a king's warehouse or not, nor is it averred to be a king's warehouse. The words of that section do not confine its operation to goods deposited for home consumption or exportation. I have had some doubts as to the first count, but if the crown takes the verdict on the second, there is an end of the question.

ALDERSON and GURNEY Bs. concurred.

Judgment for the crown on the second count.

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In *Lowe* v. *Attorney-General* (in error in the Exchequer Chamber, *June* 19, 1825,) a similar question arose as to the meaning of the words "any warehouse" in s. 44. of the Smuggling Prevention Act, 3 & 4 *Will.* 4. c. 53. The information was for the penalties incurred by harbouring the goods charged in *Attorney-General* v. *Vondiere* to have been clandestinely and illegally removed from a king's warehouse; and after argument, the court, consisting of Lord *Denman* C. J., *Littledale*, *Patteson*, *Gaselee*, and *Vaughan*, Js. held that a king's warehouse was clearly included within the terms "any warehouse."

"King's warehouse," as ascertained by 3 & 4 *W.* 4. c. 52. s. 119., is a "warehouse" within s. 44 of 3 & 4 *W.* 4. c. 53., the Smuggling Prevention Act.

GURNEY *against* HOPKINSON.

A RULE was obtained for setting aside the capias for irregularity, in alleging the cause of action to be "trespass on the case upon promises," instead of "action on promises," as in 2 *W.* 4. c. 39. Sch. No. 4. In the last vacation a baron at chambers refused to discharge the defendant out of custody on this objection. Bail to the sheriff was then given, but bail above not being duly perfected, the plaintiff took an assignment of the bail-bond and brought an action upon it against the bail. They pleaded that no writ was ever issued, upon which the defendant in the original action could or ought to be arrested. A baron at chambers had dismissed a summons for the plaintiff to be at liberty to treat this plea as a nullity and to sign judgment.

A capias which states the action to be one of "trespass on the case upon promises," instead of "an action on promises," is irregular only, (see *Reg. Gen. M.* 2 *W.* 4. No. 10. 2 *W.* 4. c. 39. s. 12.) and not void. The error can only be taken advantage of on application to set aside the writ for irregularity, and forms no defence to bail sued on a bail-bond.

Busby showed cause. The taking out a summons founded on the same objection has estopped the parties

Bail cannot apply to set it aside on that ground; for though the process, as respects the principal, is in invitum, they interpose voluntarily.

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from their present application. The objection is unfounded, for the action of trespass on the case upon promises is not taken away by 2 *W.* 4. c. 39. the uniformity of process act. Nor can the bail take this objection.

Hoggins contrà. Even if the writ be only irregular and not void, the principal is entitled to relief, and à fortiori his bail.

PARKE B.—It is too late to argue that this is not an irregularity, after it has been so frequently decided to be so. But the bail, who would not be without remedy, supposing the argument to be true that the writ is altogether void, cannot be allowed to come in and set it aside as irregular on motion. For they come in as volunteers, undertaking that the defendant shall appear to the writ; whereas the proceeding against the principal is invitum. The other barons concurred.

Rule discharged with costs to be paid by the bail (*a*).

The action on the bail-bond was afterwards tried before *Bolland* B. at a sitting in this term. The capias produced was in the form above-mentioned. The plaintiff had a verdict, subject to leave to move to enter a verdict for the defendant on the above objection.

Thesiger now moved. The defendant's arrest on this capias was improper; for since 2 *W.* 4. c. 39. there is no such writ in an action of "trespass on the case upon promises;" and the form provided by the act must be closely followed, *King* v. *Skeffington* (*b*). [*Alderson* B. By 2 *W.* 4. c. 39. s. 14. the judges had power to make rules "for the effectual execution of that act, and

(*a*) This was so ordered on a subsequent application on 18th *November*.
(*b*) *Ante*, Vol. III. 318.

of the intention and object thereof;" in pursuance of which power they made the following rule (*a*):—"That if the plaintiff or his attorney shall *omit to insert* in, or indorse on, any writ, or copy thereof, any of the matters required by the said act to be by him inserted therein or indorsed thereon, such writ or copy thereof shall not, on that account, be held void, but may be set aside as irregular, upon application to be made to the court out of which the same shall issue, or to any judge." There is no doubt, therefore, that the writ is irregular; the only question is, whether it is void? [*Parke* B. Here the party "omits to insert in the writ" the true nature of the action.] That rule only renders it necessary to insert in or indorse on the writ such matters as are directed to be so inserted &c. by sect. 12 of 2 *W.* 4. c. 39. Neither that section nor the rule apply to the nature of the action which sect. 4. virtually requires to be stated in the writ; for it enacts, that in all actions wherein it is intended to arrest and hold any person to special bail, who is not already in custody, the process shall be by writ of capias, according to the form in Schedule No. 4. How then can a party be held to bail on a writ not corresponding in form with that enactment? It is contended that the operation of the act is to avoid all writs not framed according to the schedule. The plea was, therefore, a good defence.

PARKE B.—The rule which has been cited will, happily, defeat the objection. After considering the object and provisions of the act 2 *W.* 4. c. 39. and the rule cited which arose out of and was made in pursuance of it, I am of opinion that this writ is merely irregular and informal, in omitting to insert, in the manner provided

(*a*) *Reg. Gen. M.* 3 *W.* 4. No. 10. *ante*, Vol. III. p. 4.

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by that act, what it had made requisite to be statec but that it is not void so as to afford a defence to th action.

ALDERSON B.—One of the things required to l inserted in the writ is the form of action; and in tl schedule a specimen is given thus, "an action c promises." The courts have therefore held, that tl nature of the action should be stated, and the la guage of the act strictly adhered to. The gener rule which has been cited was settled by Lord *Tente den* and the other judges, in order to prevent th particular inconvenience: if it should turn out inad quate to that purpose, and the courts were to hold th this species of error was not one which could only l taken advantage of on motion to set aside the writ irregular, the objection would never be taken till aft a bail-bond had been given, so as to deprive the plai tiff of the security of bail. The other barons cc curring,

Rule refused (a)

(a) As to amending the indorsement, see *Hooper* v. *Walker*, *ante*, 13

TOWNSEND *against* GURNEY.

Improperly inserting venue in the body of a pleading, contrary to *Reg. Gen. Hil.* 4 *W.* 4. No. 8. is not a ground of setting aside the declaration, but only of summons to strike out the surplusage.

VENUE was improperly inserted in the body declaration, contrary to *Reg. Gen. Hil.* 4 No. 8. (Vol. IV. p. xii.], but *Gurney* B. refused aside the declaration on that ground, saying, the course was to apply to a judge at chambers tc its being struck out. *Knowles* moved.

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PACKHAM v. NEWMAN.

Per Curiam.—The application to postpone the trial was, at all events, too late after the jury was sworn. The proper way is to apply to a judge, as there is an affidavit of merits.

Rule absolute on payment of costs (*a*).

(*a*) See Tidd, 9 ed. 772 and 770.

DALTON *against* TREVILLION.

If an application to change the venue has been improperly granted on the usual affidavit, and a rule is obtained to discharge it, it is no answer to that rule that there are special grounds for changing the venue, and the plaintiff will be entitled to retain it; for the special grounds of changing the venue should have been made the subject of a distinct motion.

A RULE to change the venue had been granted on the usual affidavit. A rule to discharge that rule was granted, on the ground that part of the plaintiff's demand was on a bill of exchange. *Chilton* showed cause on special grounds, admitting that *Greenway* v. *Carrington* (*a*) was overruled by *Walthew* v. *Syers*. *Per Curiam.*—The special facts relied on make no difference in the disposal of this rule, which calls on us to discharge the common rule for changing the venue. For if they afford ground to change the venue, a special application should be made on an affidavit stating them. The other side would then have the opportunity to answer them in like manner. As to *Walthew* v. *Syers*, (*b*) our practice corresponds with that of the King's Bench on that subject, and if there had been any difference in the practice of this court, it would have been considered in framing the new rules. But as that was a recent decision, and the correct practice may have been uncertain, the rule must be

Absolute without costs.

(*a*) 7 Pri. 564. (*b*) Next case.

ERRATUM.

p. 123, line 4 from bottom, *for* 'priority' *read* 'privity.'

p. 124, note *b*, add "and performance need not be averred, 1 Ventris, 41. 178. 2 Saund. 346."

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FENNELL *against* TAIT.

A lunatic may be brought up by habeas corpus ad testificandum, on affidavit that he is not a dangerous lunatic, and is in a fit state to be brought up.

THE court held, that on affidavit that a person confined as a lunatic was not a dangerous lunatic, but in a fit state to be brought up; a habeas corpus ad testificandum should be granted, and that a judge at chambers might grant it.

BARRETT *against* WILSON.

An arbitrator decided in favour of plaintiff, and then stated facts on his award, ordering that if the court should differ from him in opinion on considering those facts, a nonsuit should be entered. The court refused to set aside the award, on the ground that he had come to a wrong conclusion on the evidence, for though they did not concur in it, it did not appear that there was *no* evidence in support of it.

AN arbitrator had power by his award to direct the future use of certain rights to water. His award, after describing the premises and directing a verdict for the plaintiff with one shilling damages, stated, that in order that the parties might not be precluded from taking the opinion of the court whether, in point of law, the arbitrator had come to a right decision, he had found certain facts for the opinion of the court, which he subjoined, directing, that in the event of the court being of an opinion upon them contrary to that of the arbitrator, a nonsuit should be entered.

Alexander obtained a rule for setting aside this award, stating, among other things, that the future use of the water by the defendant was not sufficiently directed by it.

Wortley, after showing cause for a short time on the facts, was stopped.

Lord LYNDHURST C. B.—The only question here is, whether there was any evidence to support the finding of the arbitrator? for if there was, and he has drawn his conclusion in favour of presuming a grant,

it is no ground for us to interfere, even if we should ourselves have hesitation in arriving at it on the same evidence. He had no right to call on us for our opinion on a conclusion of fact merely. If the facts had been before us at the time this motion was made, we should not have granted the rule.

PARKE B.—These parties agreed to be concluded, not by our judgment as to questions of fact, but by that of the arbitrator. The court has not that jurisdiction over an arbitrator, which it has over a jury who find a verdict against the weight of evidence. It is unnecessary for me to consider whether I should have arrived at the same conclusion with the arbitrator; for as the parties are bound to abide by his decision on the facts, the court cannot interfere unless *no* evidence was given in support of it. The submission gives power to the arbitrator to direct the mode in which the use of the water shall in future be regulated, but does not make it a condition that that direction should be given.

ALDERSON B.—The only question is, whether any evidence was given before the arbitrator which, had it been given at nisi prius, ought to have been left to a jury. For if there was, we cannot interfere with the arbitrator's conclusion. Had a verdict been given the same way at nisi prius, the defendant could only have moved to set it aside as being contrary to the weight of evidence. As to the alleged uncertainty of the award, it is quite certain as to all that is referred. Had a special power been reserved to the arbitrator to make the facts a special case for our opinion, it might have been different.

GURNEY B. concurred.

Rule discharged.

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BROWN *against* GERARD, Bart.

In an action against a sheriff for extortion by his officer, the latter, in consideration of a stay of proceedings, undertook by a written memorandum to pay a sum of money to the plaintiff in seven days with costs, and on default of such payment, to withdraw his plea and suffer the plaintiff to have judgment. On motion to the court to compel the officer to perform his undertaking, they refused to do so in that summary way, saying he was not an officer of the court.

CASE against a sheriff for extortion by one o officers of more than the legal fees on an exec against the plaintiff. The officer defended the ac and on the commission day of the assizes at whi stood for trial signed the following memorandum: consideration of the plaintiff agreeing to accept for the debt in this cause, and of his staying the ceedings therein, I do hereby undertake to pay the said sum of 12*l.*, together with the costs of said action, in seven days from this date; and if de is made therein, I undertake that the plea plead this action shall be withdrawn, and the plaintiff have judgment." In consequence of this underta the cause was not entered. *Oglethorpe* neither the money nor withdrew the bill.

Wightman moved for a rule nisi to compel hi perform his undertaking. The sheriff is the offic the court, and the real defendant is his bailiff, w therefore within their power.

GURNEY B. (Sitting alone.)—The person ag whom this motion is made is neither an officer o court nor a party in the cause. Then he cannc compelled on motion to perform his undertaking. tornies are so compelled because they are office the court.

Rule refus

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BYRNE *against* FITZHUGH and Another.

A motion to set aside an award made in the *Common Pleas* at *Lancaster* under an order of nisi prius, cannot be made in banc under 4 & 5 *W.* 4. c. 62. s. 26., though a verdict was taken subject to the award, but must be made before a single judge.

AN action having been brought in the *Common Pleas* at *Lancaster*, a verdict was taken for the plaintiff at the *Lancaster* assizes, subject to be reduced by an arbitrator. The award directed the verdict to be entered for a reduced amount of damages, but stated facts specially in order to enable the defendant to obtain the opinion of the court on a question of law, adding, that if that question was decided in the defendant's favour a nonsuit ought to be entered (*a*).

Kelly moved to set aside the award, contending, that as his application was in effect to set aside a verdict and enter a nonsuit, this court had power to entertain it under 4 & 5 *Will.* 4. c. 62. s. 26 (*b*).

PARKE B.—A motion of this nature is not within the meaning of the section cited. Accordingly, sitting here, we have no power to grant it. The result is, that you may apply to any individual judge at chambers, all of them having been appointed judges of the *Common Pleas* at *Lancaster* under section 24. of the act.

Rule refused.

(*a*) See this case *ante*, 54.

(*b*) Which enacts, "that it shall be lawful for any party in any action now depending, or hereafter to be depending in the said court of C. P. at Lancaster, to apply by motion to any of the superior courts at *Westminster*, sitting in banco, within such period of time after the trial as motions of the like kind shall from time to time be permitted to be made in the said superior court, for a rule to show cause why a new trial should not be granted or nonsuit set aside and a new trial had, or a verdict entered for the plaintiff or defendant, or a nonsuit entered, as the case may be, in such action: which court is hereby authorized and empowered to grant or refuse such rule."

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BLIGH and Another, Executors of J. M. BLIGH, *against* BREWER.

A defendant, while in custody on mesne process, agreed to execute a cognovit. The clerk to the plaintiff's attorney told him he must have an attorney present on his behalf. His own attorney being absent from the town, the clerk suggested to the defendant that *C.* another attorney would act in the matter for him. The defendant answered, he did not care much who it was, and went to his office. *C.* then asked the defendant if he wished him to attest his execution of the cognovit. Defendant answered yes, and prevented him from reading it over, saying he knew its contents: Held, that this was an "express naming" of the attorney within *Reg. Gen. Hil.* 2 *W.* 4. No. 72.

A Rule had been obtained, calling on the plaintiffs to show cause why the cognovit given by the defendant in this cause, and the judgment and execution thereon, should not be set aside, on the ground that the defendant's execution of the cognovit had not been subscribed by an attorney named by him and attending at his request, pursuant to *Reg. Gen. Hil.* 2 *Will.* 4. No. 72., which provides that "no warrant of attorney to confess judgment or cognovit actionem given by any person in custody of a sheriff or other officer, upon mesne process, shall be of any force, unless there be present some attorney on behalf of such person in custody, expressly named by him, and attending at his request to inform him of the nature and effect of such warrant or cognovit before the same is executed; which attorney shall subscribe his name as a witness to the due execution thereof, and declare himself to be attorney for the defendant, and state that he subscribes as such attorney." (*a*) The following is the sum of the affidavits of one of the plaintiffs, an attorney. The defendant being arrested on a promissory note given by him to the plaintiff's testator, was carried to the office of one of the plaintiffs, who was an attorney at *Bodmin*. *Coode*, the defendant's own attorney, saw him there, but it not being resolved whether the action should be defended or not, *Coode* went away out of the town. The defendant finally agreed to give a cognovit for debt and costs, which the plaintiff's clerk prepared, telling him that an attorney

(*a*) *Ante*, Vol. II. 347. The court refused to enter into the alleged illegality of the consideration for the cognovit.

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the pressure of an arrest, ought to be considered incapable of waving the benefit of this rule; and, at all events, and in all cases, he should be protected by the advice of an attorney expressly attending for him. Lord *Kenyon* added, these rules were framed, not to guard the defendant against actual fraud, but to exclude, if possible, all questions respecting it. The warrant of attorney was ultimately set aside. *Walker* v. *Gardner* (*a*) arose on the same rule of 4 *Geo.* 2. The defendant being arrested offered a warrant of attorney; the plaintiff's attorney came at his request to the place where he was in custody, and proposed another attorney whom he brought with him to read over the warrant of attorney to the defendant, and attest it on his behalf. The defendant acquiesced, though the attorney thus brought to him was not previously known to or sent for by him; and the court supported a judge's order for setting aside the warrant of attorney, Mr. Justice *Taunton* relying much on the above passage cited from *Hutson* v. *Hutson*. The defendant was entitled to have an attorney sent for by himself to attend at his request, in order to his legal advice, as well as mere attestation. In *Fisher* v. *Papanicolas* (*b*), though the defendant had consulted his attorney, who advised him to give the warrant of attorney, it was held that the attendance of another attorney, who was requested by the clerk to the defendant's attorney to attest the execution, was not sufficient within the rule of *Hil.* 2 *W.* 4., as he was not named by and did not attend at the defendant's request. That is a stronger case than the present.

PARKE B.—Every requisite of the rule has been complied with in this case. The rule expressly re-

(*a*) 4 B. & Adol. 371. (*b*) *Ante*, Vol. IV. 44.

quires three things; first, that at the execution of a cognovit or warrant of attorney by a person in custody an attorney shall attend on his behalf; secondly, that he shall be a different person from the plaintiff's attorney; and, thirdly, that he shall be expressly named by the defendant and attend at his request. Here, the defendant having agreed to give a cognovit, was told by the plaintiff's clerk that an attorney must be present on his behalf. It does not appear that *Coode*, the defendant's attorney, was in *Bodmin* at that time. The plaintiff's clerk suggested that Mr. *Commins* an attorney was in the town and would attend; to which he answered, he did not care much who it was, and made no objection to the clerk's going to *Commins*. Had it stopped there the case might have been different, the defendant having never named an attorney; but he went afterwards, in the sheriff's custody, to *Commins's* office, and on his asking whether he wished to have him as his attorney, answered "yes." His attendance on *Commins* in custody is the same as if *Commins* had been sent for and attended him elsewhere. Now the rule requires the attorney to be "expressly named" by the person in custody, and it seems to me that as the defendant, by an affirmative expression, adopted *Commins* as his attorney, it is the same thing as if he had sent for him in the first instance and said, "I wish you to be my attorney." The order in which the words were uttered is immaterial, if the defendant expressed himself to that effect. Next, did the attorney act at his request? Now whether the attorney attended him, or he the attorney, is equally immaterial, if the attorney, at his request, attended to the matter in hand. The object of the rule is to inform a defendant of the nature and effect of the instrument he is about to execute; if that is done, it is unnecessary to read it over to him. Then every requisite of the rule was complied with. The attorney

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was not the attorney of the plaintiff, and attended behalf of the defendant, being expressly named by hi and attending at his request. That circumstance di tinguishes this from the cases cited. In *Fisher* *Papanicolas* the defendant said nothing, he only a stained from objecting. So in *Gardner* v. *Walker* th defendant's expressions of acquiescence were positivel denied on oath. Here, on the other hand, the defen ant, by a positive expression, assented to the acting a particular attorney. For these reasons the rule mu be discharged.

BOLLAND B.—I accede to the distinction drawn b my brother *Parke* between this and the cases he ha mentioned. The rule has been complied with; fo though the defendant did not name *Commins* as hi attorney, he went to his office, and having first in term adopted the proposal of *Commins* to be his attorney i the matter, executed the cognovit. That appears t me to be the strict compliance with the rule whic Lord *Kenyon* required. If no affirmative words ha been used by the defendant, or if he had execute the cognovit before adopting *Commins* as his attorney it would have been different.

ALDERSON B.—Though I entertained so much doub on this case at chambers, that I sent it to the court, my opinion since the discussion agrees with those already expressed. By the rule, the attorney must be "ex pressly named" by the defendant; which shows tha that nomination must not be left to mere inference That also appears from *Gardner* v. *Walker*, where i was sought to infer the fact of nomination from th defendant's having afterwards paid the attorney for hi attendance, and from *Fisher* v. *Papanicolas*, where like inference was contended for from the defendant

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having made no objection. But in order to an "express naming" of the attorney within the rule, his individual name need not be mentioned by the defendant, if the expressions actually used by him point out the attorney as the person to act in the affair. Here, if we believe the affidavits, nothing is left to inference, for there was an express naming of *Commins* as the defendant's attorney; a fact which will reconcile all the cases.

GURNEY B. concurred.

Rule discharged with costs.

GRANT'S bail.

Country as well as town bail are entitled to costs of justification where, after the notice of bail has been accompanied by an affidavit of each of them in the form provided by *Reg. Gen. Trin.* 1 *W.* 4. the plaintiff excepts to them and they are allowed. (*Reg. Gen. Trin.* 1 *W.* 4. No. 3.)

COUNTRY bail by affidavit being opposed, time was granted them to explain the circumstances of an incumbrance said to exist on the property mentioned in the affidavit accompanying the notice of bail. They afterwards made a satisfactory affidavit, and having been allowed, the defendant applied for the costs of justification under *Reg. Gen. Trin.* 1 *Will.* 4. No. 3. [*Ante*, Vol. I. 521.] It was objected that the rule did not apply to country bail.

GURNEY B., after consulting the master, said,—The defendant is entitled to the costs, for the rule applies as well to country as town bail.

1834. MEMORANDA.

The Right Hon. Sir *John Leach* Knight, Master of the Rolls, died at *Edinburgh* during the vacation after last term, and was succeeded by his Majesty's Solicitor-General, Sir *Charles Christopher Pepys* Knight. Early in this term, *Robert Mounsey Rolfe* esq., one of the King's counsel, was appointed the King's Solicitor-General in lieu of Sir *C. C. Pepys.*

On the 10th *November* in this term, *Richard Preston* esq. of the Honorable Society of the *Inner Temple,* having been appointed a King's counsel, took his seat within the bar.

On the 21st *November* in this term, the Right Hon. *Henry* Lord *Brougham and Vaux* resigned the Great Seal, which his Majesty was graciously pleased to deliver to the Right Hon. *John Singleton* Lord *Lyndhurst,* Lord Chief Baron of the Court of Exchequer. Lord *Lyndhurst* was accordingly sworn in Lord High Chancellor on the 22d *November,* but continued to preside as Chief Baron during the rest of the term, and till the 23d *December* 1834.

On his resignation in the vacation after this term, Sir *James Scarlett* Knight was appointed Lord Chief Baron, and upon that occasion received the dignity of a peerage by the title of Baron *Abinger,* of *Abinger* in the county of *Surrey,* and of the city of *Norwich.* His lordship took his seat in the Court of Exchequer on the first day of *Hilary* term 1835.

In the vacation after this term, Sir *John Campbell* Knight, and *Robert Mounsey Rolfe* esq., having resigned

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their respective offices of the King's Attorney and Solicitor-General, *Frederick Pollock* esq. of the *Inner Temple*, one of his Majesty's counsel, was appointed to the vacant office of his Majesty's Attorney-General, and *William Webb Follett* esq. of the *Inner Temple*, to that of his Majesty's Solicitor-General. Both afterwards received the honour of knighthood. Sir *William Webb Follett* was also appointed a King's counsel, and took his seat within the bar on the first day of *Hilary* term.

END OF MICHAELMAS TERM.

REPORTS OF CASES

ARGUED AND DETERMINED IN THE

COURTS OF EXCHEQUER OF PLEAS

AND

EXCHEQUER CHAMBER,

IN

Hilary Term,

IN THE FIFTH YEAR OF THE REIGN OF WILLIAM IV.

MEMORANDUM.

Hilary Term, 5 *Will.* 4. 1835.

1835. THE Hon. Sir *William Elias Taunton*, Knight, one of the Judges of the Court of King's Bench, died at his house in *Russell Square*, on the day before the commencement of this term. *John Taylor Coleridge*, esq. Serjeant at Law, was appointed to succeed him, and took his seat accordingly on the 29th *January*. He was afterwards knighted.

The following gentlemen having been appointed King's Counsel in the last vacation, took their seats within the bar, on the first day of this term, viz.:— *Daniel Wakefield, Henry John Shepherd, Walter Skirrow, Christopher Temple, Edward Jacob, John Miller, Richard Torin Kindersley, James Wigram*, and *Fitzroy*

Kelly, of Lincoln's Inn, Esqs.; *William Burge*, *George Spence*, and *Thomas John Platt*, of the Inner Temple, Esqs.; and *Charles Henry Barber*, of Gray's Inn, Esq.

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BATLEY *against* HEALD.

Country bail stating himself to be a housekeeper at a place named, but not that he was resident there, allowed without costs.

THE affidavit of a country bail stated that he was a housekeeper at a place named, not saying that he was residing there. *Robinson* for the plaintiff did not oppose the justification on this account, but applied to be saved from costs, as the affidavit of the bail had not complied with the form provided by *Reg. Gen. Trin.* 1 *W.* 4. [*Ante*, Vol. I. 524.]

Bail allowed without costs.

CALL *against* THELWALL.

Bail who apply to stay proceedings on the bail-bond, on payment of costs, should state in their affidavit that they apply "at their own expense, and for their *only* indemnity," according to *Reg. Gen.* of K. B. 59 *G.* 3. adopted in this court; and if the affidavit states that they apply "for their own indemnity," it is insufficient.

RULE to show cause why the proceedings on the bail-bond should not be stayed on payment of costs. The affidavit stated, that the application was made by the bail "at their own expense and for their *own* indemnity."

S. Hughes showed cause that the application should have been stated to be made "at his and their own expense, and for his and their *only* indemnity," by analogy to the rule of the King's Bench, 59 *Geo.* 3. (a). The form in *Price's* Exchequer Practice, p. 157. is, for their *sole* indemnity. In *Rex* v. *Sheriff of Surrey*, in *Weston* v. *Woods*, [*Ante*, p. 184.]

(a) 2 B. & Ald. 240.

Where the plaintiff has not declared de bene esse, the plaintiff cannot insist on the bail-bond standing as a security.

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CALL
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Lord *Lyndhurst* said it was better to adhere to the established form, and not to consider in every case what would be an equivalent to it. The defendant may have an interest in the motion. If the rule is not discharged, the bail-bond should stand as a security. [*Parke* B. That cannot be, as the plaintiff has not declared de bene esse, and cannot therefore have lost a trial.]

Addison in support of the rule. The term "own," in this affidavit, has, in substance, the same meaning as "only" in the rule 59 *Geo.* 3. Nor is that rule a rule of this court. [*Parke* B. It has been adopted here in practice.] The bail-bond will not be directed to stand as a security, for the plaintiff has not declared de bene esse, though he might have done so, pursuant to *M.* 3 *W.* 4. Rule 11. [*Ante*, Vol. III. p. 4.] The defendant not being in actual custody, *Reg. Gen. H.* 2 *W.* 4. No. V. (*Ante*, Vol. II. 351.) only provides for the bail-bond standing as a security, if the plaintiff "shall have declared de bene esse."

Per Curiam.—As the plaintiff has not declared *de bene esse*, he is not entitled to have the bail-bond stand as a security. The affidavit of the bail is irregular in stating that the application is "for their own indemnity." The rule may be enlarged for four days in order to amend the affidavit, on the terms of putting the plaintiff in the same situation as if he had not been delayed for that time, and of the defendant taking short notice of trial.

The affidavit having been amended,

Rule absolute on payment of costs.

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CLARKE and Another, Assignees of SUTTON, a Bankrupt, *against* NICHOLSON, Esq. late Sheriff of Surrey.

An execution having issued against a trader, his goods were seized and sold under it, after he had committed an act of bankruptcy. The assignees having brought trover,—Held, that the jury in assessing the damages might deduct the expenses of the sale from the proceeds of the goods.

TROVER for furniture. Plea, that defendant brings into court the sum of *24l.* 15*s.* ready to be paid to the plaintiffs as assignees, and that the plaintiffs have not sustained damages to a greater amount, &c. Replication, that the plaintiffs have sustained damages to a greater amount. The cause was tried at *Guildhall*, before *Parke* B. at the *London* sittings after last term, and the following appeared to be the facts:—The defendant, as sheriff of *Surrey*, had taken in execution and sold the furniture, &c. of *Sutton* a trader, after he had committed an act of bankruptcy. A fiat issued after the sale, and this action was brought to recover the amount received by the defendant for the proceeds of the goods. The defendant having deducted 6*l.* 5*s.*, the expenses of sale, from the proceeds, paid the residue, *24l.* 15*s.*, into court. The defendant's right to make that deduction was denied by the plaintiff, but *Parke* B., in his charge to the jury, said, that as the plaintiffs must themselves have gone to a similar expense in selling the goods, the amount charged for such sale might, if the jury thought it reasonable, be deducted from the amount to be paid over to them. Verdict for the defendant.

R. V. Richards moved for a new trial. The observation of the learned judge to the jury might have been correct had the sheriff been the plaintiffs' agent for effecting the sale, but the sale by him being wrongful as regards the plaintiffs, he cannot, as against them, deduct the expense of it from the produce of their goods. [Lord *Abinger* C. B. It is not alleged that the learned judge laid it down to the jury that the de-

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fendant was entitled to the deduction as matter of law: he merely suggested to the jury, that as the assignees would probably have expended a similar sum for the same object, the jury might allow the reasonable expenses out of the damages. That is the common course in cases of this kind.] That is so where the assignees assent to the valuation. [Lord *Abinger* C. B. Was it not a question for the jury whether a sufficient sum had been paid into court? They decided that the plaintiffs had not sustained a greater injury than 24*l.* 15*s.* That was within their province.] Suppose goods to be seized in three several counties, and sold in each of the three by the sheriff, the expenses of sale would treble those which the assignees would incur by selling all of them at once. [*Alderson* B. As you received the net proceeds, what damage have you sustained?] The difference in expense between the sheriff's sale by auction, and the plaintiffs' sale of the other goods by private contract. [*Gurney* B. Had you given notice to the sheriff to sell in some other mode than by auction, which he disregarded, it might have been different.] The question is not one of hardship to the sheriff, but of the value of goods to the assignees. In *Glasspoole* v. *Young* (*a*) the owner of goods wrongfully seized under a fi. fa. against another person, was held entitled to recover the value of them, though exceeding the price for which they were sold. [*Gurney* B. There the plaintiff never intended to sell.] If the expenses are allowed, the assignees will not get the value of the goods.

Lord ABINGER C. B.—Whether a sheriff placed in circumstances resembling the present, is absolutely entitled to deduct the expenses of the sale, need not be now decided; for this being an action for damages,

(*a*) 9 B. & Cr. 696.

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the jury, in assessing them, were at liberty to make a deduction in favour of the defendant for an expense which he had incurred, and to which the assignees must have otherwise been liable. Had there been several sales, they might have considered that fact; but as the case stands, there is no ground for disturbing the verdict.

Rule refused.

DICAS *against* LAWSON.

Where it appears from the notes and information of a judge who tried a cause, that the attendance of a witness who has been subpœnaed would be wholly immaterial to the event, no attachment for contempt in not attending will be granted.

LEE moved for an attachment against Lord *Brougham and Vaux*, for a contempt of the court in not appearing as a witness at the trial of this cause, pursuant to a subpœna to that effect, issued out of this court. The service of the writ and tender of reasonable expenses were sworn to; and it was also sworn that the evidence of the witness was material and necessary for the plaintiff. The ground on which motions of this kind are entertained, is the contempt of the process of the court.

Lord ABINGER C. B.—This affidavit might be sufficient for its purpose, were we not in possession of the notes of my brother *Alderson*, who tried the cause, as well as supported by his information of the purpose for which Lord *Brougham* was subpœnaed. The learned baron reports that the purpose for which that noble person's attendance was sought was immaterial; and that the event of the cause vibrated between a farthing damages and a verdict for the defendant. Seeing this as we do, we ought not to allow the process of the court to be diverted to the purposes of useless vexation. The other barons concurred.

Rule refused.

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LAWES *against* HUTCHINSON.

A defendant was sued, first, in the palace court, and afterwards in the Exchequer, and gave bail in both. The first cause having been removed into the King's Bench by habeas corpus, was remanded to the palace court by procedendo, and interlocutory judgment was signed, and a writ of inquiry executed there; upon which the defendant was rendered by his bail to the prison of that court, the marshalsea. His bail in the other action in the Exchequer then issued a habeas corpus cum causâ out of that court, and got a rule to show cause why it should not be duly returned and filed, in order to enable them, by so removing his body with the cause into this court, to tender him there in their discharge:—Held, that since 21 *Jac.* 1. c. 23. s. 3. this court had no power to remove a cause out of the palace court after interlocutory judgment there, except by writ of error; but fourteen days' time was given to the bail to render the defendant in this court after his custody in the palace court should expire.

A Rule had been obtained in *Michaelmas* term by *Mansel* on behalf of the bail, calling on the plaintiff and one *Taylor*, who had sued the defendant in the palace court, to show cause why the writ of habeas corpus sued out of this court, directed to the judge of the palace court, should not be duly returned to and filed in that court, and why the defendant's bail in this action should not, after the determination of the custody of the defendant in the palace court, have fourteen days time to render the defendant in this action. On 6th *October* process at suit of *Taylor* issued out of the palace court, and bail was put in. On the 11th the defendant sued out a habeas corpus cum causâ from the King's Bench, but the plaintiff succeeded in remanding the cause by procedendo, and on the 31st executed a writ of inquiry, in consequence of which the defendant was rendered to the *Marshalsea*. The defendant sued out another habeas corpus cum causâ from this court on 14th *November*, and lodged it at the palace court. The judge made a return under 21 *Jac.* 1. c. 23. s. 3., setting forth that a procedendo had issued. The capias in the action in this court issued against the defendant on 21st *October*, and bail justified on 8th *November*.

Walsh showed cause for *Taylor*, but no one appeared for the defendant. First, as the cause had been once removed from the palace court, and was afterwards remanded there by procedendo, it could not be again

removed or stayed before judgment by any writ out of any court soever, 21 *Jac.* 1. c. 23. s. 3. Here, no final judgment having been signed, the act applies. Secondly, this motion was too late after interlocutory judgment signed, and writ of inquiry executed. For statute 43 *Eliz.* c. 5. shows that the habeas corpus was not delivered in due time. That act provides, "that no writ of habeas corpus, or any other writ sued forth out of any of her majesty's courts of record at *Westminster*, to remove any action, suit, plaint, or cause depending in any court within any city or town corporate, or elsewhere, which have or shall have jurisdiction &c. to hold plea in any action, plaint, or suit, shall be received or allowed by the judge or judges &c. of the court wherein or to whom such writ shall be delivered, (but that he and they shall and may proceed in the said cause and causes ready to be tried, as though no such writ was sued forth or delivered to him or them,) except that the said writ be delivered to the judge &c. of the said court, before that the jury which is to try the cause in question between the party or parties plaintiffs, and the party or parties that sued forth the said writ or writs, or for whose benefit the said writ or writs has or shall be sued forth, have appeared, and one of the said jury sworn to try the said cause." So, after judgment by default and notice of inquiry, it must be allowed before any one of the jury is sworn; *Cox* v. *Hart* (a).

Mansel in support of the rule. The court will not disapprove of this motion by the bail, its object being to bring up the defendant's body from the prison of the palace court in order to render him in this action, or at least to have him sent back to the palace court charged with this debt. In *Waugh* v. *Ashford* (b), the

(a) 2 Burr. 759.

(b) 1 Bing. N. C. 294.

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court of Common Pleas suspended proceedings on a scire facias against bail for a term where the principal had been committed to criminal custody by a subdivision court of bankruptcy (*a*). Nor can this court be without the same inherent power as the King's Bench, to order the defendant to be brought up in custody from the Marshalsea prison in order to be rendered, or at least charged in execution with the debt in this action. As final judgment is not signed in the court below, 21 *Jac.* 1. c. 23. does not estop a proceeding like the present to remove the body into this court. The plaintiff may then go on here to final judgment. In any event, time to render must be given, as the plaintiff does not appear to show cause against the rule.

Lord ABINGER C. B.—The keeper of the Marshalsea is not an officer of this court, so that we can only give the bail fourteen days to render after his custody in the palace court has determined.

PARKE B.—The restriction of 21 *Jac.* 1. c. 23., by which a cause which has been once remanded by procedendo to an inferior court of record, cannot be again removed "before judgment," was intended to prevent its being removed except on writ of error. Then have we any power to remove a cause out of the palace court after judgment, except by writ of error under 19 *Geo.* 3. c. 70., and 32 *Geo.* 3. c. 68., which empower superior courts to issue execution on the judgments of inferior courts, where there are not sufficient goods within their jurisdictions to satisfy those judgments? The court of King's Bench has power over the keeper of the Marshalsea as an officer of that court. The

(*a*) See note in next page.

prisoner being in the custody of his bail must be looked to by them.

Rule discharged with costs as to all, except giving fourteen days' time to the bail to render, and made absolute as to that part (*a*).

(*a*) See *Offley* v. *Dickons*, 6 M. & S. 348; *Harris and another* v. *Alcock*, *Ante*, Vol. II. 418; and *Coombs* v. *Dod*, 3 M. & S. 817; not cited in *Waugh* v. *Ashford*.

FOSTER *against* JOLLY.

When a note is payable fourteen days after date, and is not deposited as a collateral security, nor is the consideration disputed, no parol testimony is admissible to prove any agreement that it was not to be paid if a verdict was obtained in an action then pending between other parties; for that would be to contradict a written contract by parol evidence.

A motion for a new trial under 4 & 5 *W.* 4. c. 62. s. 26., in an action brought in the Common Pleas at *Lancaster*, must be made in the court of which the judge who presided at the trial is a member.

ASSUMPSIT on a promissory note for 12*l.*, payable 14 days after date, by the payee against the maker. Plea: (before the new rules of pleading) the general issue. The action was brought in the Common Pleas at *Lancaster*, and at the trial before *Gurney* B. at the last assizes there, it appeared, that upon the plaintiff, as attorney of one *Walker*, suing one *Milnes* for goods delivered at his request to a co-operative society, *Milnes* furnished him with the names of certain of the members, who were afterwards sued and verdicts obtained against them. *Milnes* in the meantime gave a cognovit, on which he was taken in execution, and while in custody, defendant, his brother-in-law, gave the note now sued on to procure his discharge by settling *Milnes*'s debt. The hand-writing of the defendant having been proved, a defence was set up that the note having been given as a security for a debt due from another person, it was agreed that it should not be enforced should a "verdict be obtained" by *Walker* against the members of the co-operative society, as he had since done. For the plaintiff it was answered, that the promissory note

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could not be barred by parol evidence of that agreement; and that if it could, the note remained in force by it, unless *Walker* obtained the fruits of the verdict. The learned baron received the evidence, giving the plaintiff leave to move to enter a verdict for 12*l.* if the evidence was improperly admitted. The jury found that the note was given on an undertaking by the plaintiff to give it up, if a verdict was obtained by *Walker* in his action against the society. Verdict for defendant. *Wightman* for plaintiff first moved in the King's Bench to enter a verdict, but that court said that the judges had resolved that these motions, under 4 & 5 *Will.* 4. c. 62. s. 26. should be made in the court of which the judge who presided at the trial was a member. This court afterwards granted him a rule, against which

Alexander for the defendant now showed cause. *Pike* v. *Street* (*a*) is an authority that though the note was in its terms absolute, parol evidence was admissible between the original parties to show that the payee agreed not to sue the maker. That was an action by the indorsee against the drawer and indorser of a bill. Lord *Tenterden* suffered the defendant to prove that the plaintiff had given value for the bill to the defendant, under a parol agreement to sue the acceptor only; and left it to the jury to say, whether or not the plaintiff took the bill on the terms that he should have recourse to the acceptor, and to him only, without suing the defendant at all? directing them that if they found in the affirmative, their verdict should be for the defendant, "such an agreement being a good bar to the action." [*Parke* B. The effect of that case is only to show that the defendant may deny the primâ facie evidence afforded by the bill of a consideration moving

(*a*) Moody & Mal. 226.

from the plaintiff to the defendant.] The agreement in this case falls within the principle stated by Lord *Tenterden*. It is the daily practice not only to contradict by oral testimony the consideration which is implied upon a bill or note, but also to contradict its express statement, that it was given for value received, by showing that it was not. *Moseley* v. *Hanford* (a) is distinguishable; for as the note in that case was payable on demand, the agreement that it should be payable on the delivery up of the possession of particular premises, directly and necessarily contradicted its terms. Whereas in this case the note is not impugned, though matter in defeazance of it is relied on.

Wightman contrà. *Moseley* v. *Hanford* fully sustains this rule. [Lord *Abinger* C. B. Does it not become a question, whether the note was given as a collateral security, in case *Walker* did not receive the fruit of the verdict? If it was, it would be a defence to show that the consideration on which it was so given was performed; the terms of the note need not then be varied.] There was no evidence to show that the note was given as a mere collateral security. The parol agreement was, that though in its terms payable at a certain day, it should be defeasible on the occurrence of a stated contingency. All the cases show that a written contract cannot be thus varied by parol. Any surplus which *Walker* did not recover against the society might have been obtained on this note. [*Parke* B. The question is, whether parol evidence was admissible to contradict the existence of value which is implied from every note. Lord *Abinger* C. B. The defendant may give any matter in evidence to impeach the consideration, by showing that the note was given as a

(b) 10 B. & Cr. 729.

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collateral security, or as a pledge for an event which has happened.] This defendant has not disputed the original consideration, or said that it has failed; but says that his note, though expressed to be payable at a day certain, is not absolutely due then, but may or may not become due, according to a contingency whether a verdict has or has not been obtained by a third person. No case supports the alteration of a written contract by importing into it such a contingency by parol. [*Alderson* B. The note would not be a good one if expressed to be payable on a contingency, as the arrival of the ship *Juno*. If the evidence in question would render it uncertain whether the maker was liable on the day on which the note was expressed to be absolutely payable, it would be a variation of the contract. The recovery of a verdict, like the arrival of the ship, might or might not take place before the note became payable.] A note given as a collateral security should be given at a date long enough to allow the event to be ascertained in the meantime; but as this note is made payable at a day certain, all the authorities show that the defendant cannot show that it did not become due on that day, but at a subsequent and uncertain time; *Free* v. *Hawkins* (a), *Woodbridge* v. *Spooner* (b), *Rawson* v. *Walker* (c), *Mosely* v. *Hanford* (d), *Selly* v. *Hindes* (e).

Lord Abinger C. B.—The argument for the defendant at first induced me to doubt whether this might not be taken to be a question of consideration only; but I am now satisfied that the consideration of the note, being the deliverance of the defendant's brother-in-law from arrest, was sufficient at the time, and that it was

(a) 8 Taunt. 92. *S. C.* Holt, C. N. P. 550.
(b) 3 B. & Ald. 233. *S. C.* 1 Chit. Rep. 661.
(c) 1 Stark. C. N. P. 361.
(d) 10 B. & C. 729.
(e) *Ante*, Vol. IV. 305.

not given as a collateral security. The question then is, whether, as the defendant has chosen to make a note payable at a certain day, he can give parol evidence of an agreement respecting it inconsistent with its being then payable? I am of opinion, that as the evidence in question tended to vary the contract for payment at a certain day apparent on the face of the note, by substituting a contingent term of payment, it amounted to a direct contradiction of its terms. That cannot be permitted. The case of *Rawson* v. *Walker* is strongly in point.

PARKE B.—After some doubt on the subject, I am of opinion that this evidence was inadmissible. Every bill or note admits two things; value expressed or implied, and a contract to pay at a given time. I have always understood the rule to be, that as between the maker and payee of a note, the former may dispute or contradict the original existence of consideration, or may show it to have altogether failed, but cannot contradict the express contract to pay at the stated time. Now in this case the event, on the occurrence of which the defendant contends that the note was payable, had not happened, and at the time of payment expressed in the note might never happen. Now that appears to be an express contradiction of the contract expressed in the note. *Rawson* v. *Walker* therefore applies, while *Pike* v. *Street* falls within that class of cases where the consideration has been contradicted. The agreement there proved was, that the defendant, though the indorser, should not be sued, but the acceptor only. That negatived any consideration having moved from plaintiff to defendant, and was therefore admissible; whereas the parol evidence in this case goes to alter the written contract to pay in fourteen days (*a*).

(a) As to the effect of a cotemporaneous memorandum written on the

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ALDERSON B.—Parol evidence is admissible to refute the receipt of value by the defendant, or in other words, the consideration of a bill or note; but not to vary the engagement contained in it. Here, the note was for payment at a specified time, viz. fourteen days after date; and it is attempted to vary that contract by importing an oral agreement that the payment was only to be made upon the occurrence of a contingency, which might or might not take place within that time. Then the general rule applies, that matters in writing shall not be contradicted by parol.

GURNEY B. concurred.

Rule absolute to enter a verdict for the plaintiff(a).

note or a separate paper in varying the terms of it, see Bayley on Bills, 4th ed. 63. 2 Campb. 205. 4 M. & S. 25. 4 Campb. 127. 3. C. 1 Stark. C. N. P. 53. 2 id. 286. 4 Taunt. 844.

(a) See Chitty on Bills, 193 a.; *Perfect* v. *Musgrave*, 6 Pri. 111; *Price* v. *Edmunds*, 10 B. & Cr. 578; *Hall* v. *Wilcox*, 1 Moody & Rob. 58.

TIMOTHY *against* SIMPSON.

Trespass for assault and false imprisonment, and taking the plaintiff to a police station-house. Plea: that defendant was possessed of a dwelling-house, and that the plaintiff entered the dwelling-house, and then and there insulted, abused, and ill-treated the defendant and his servants therein, and greatly disturbed them in the peaceable possession thereof, against the king's peace; whereupon the defendant requested the plaintiff to cease his disturbance and to depart from and out of the house, which the plaintiff refused to do, and continued in the same, making the said disturbance and affray therein: that thereupon the defendant, in order to preserve the peace and restore good order in the house, gave charge of the plaintiff to a certain policeman, and requested him to take the plaintiff into his custody to be dealt with according to law; and that the policeman, at such request of defendant, gently laid his hands on the plaintiff for the cause aforesaid, and took him into custody.

TRESPASS for assaulting the plaintiff and taking him to a police station-house. Pleas:—first, not

guilty; secondly, as to the assaulting, seizing, and laying hold of the plaintiff, as in the first count of the said declaration mentioned, and forcing and compelling him the said plaintiff to go in and along the said streets to the said police station in the said first count mentioned, and as to imprisoning the said plaintiff, and keeping and detaining him in prison for the said time, in the said first count also mentioned, the said defendant says, that before and at the same time when &c., as in the said first count mentioned, the said defendant was lawfully possessed of a certain dwelling-house in the city of *London*, and the said defendant being so possessed thereof, the said plaintiff, just before the said time when &c., to wit, on the day and year in the said first count of the said declaration mentioned, at *London* aforesaid, entered and came into the said dwelling-house, and then and there with force and arms made a great noise, disturbance, and affray therein, and then and there insulted, abused, and ill-treated the defendant and his servants in the said dwelling-house, and greatly disturbed and disquieted them in the peaceable and quiet possession of the said dwelling-house, in breach of the peace of our said lord the king; whereupon the defendant then and there requested the plaintiff to cease his said noise and dis-

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The facts proved were, that the plaintiff passing the shop of defendant, a linen-draper, went in and required to purchase an article at a price marked on a ticket apparently affixed to it. The plaintiff disputed with the shopman about the price, and was desired to leave the shop, which he refused to do. One of the shopmen then attempted to turn him out, and, on the plaintiff's resistance, the other shopmen took part against him, and an affray took place. Defendant entered the shop before the scuffle ended, and desired the plaintiff to leave the shop quietly, which he refused, unless he could get his hat; upon which the defendant gave him in charge to a policeman, who took him to a station house, where the charge was dropped. Held, first, that the plaintiff having persisted in remaining on the spot where the affray had taken place, the giving him in charge was justifiable, under the above circumstances, in order to prevent the affray from being continued or renewed: secondly, that the plea was not substantially proved, for the defendant had failed to prove any assault on himself.

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turbance, and to depart from and out of the said l which he the said plaintiff then and there whol fused to do, and continued in the house maki soid noise, disturbance, and affray therein; wher the defendant, in order to preserve the peace a store good order and tranquillity in the said l then and there gave charge of the plaintiff to a p man of the city of *London*, and then and there requ the said policeman to take the plaintiff into his tody, to be dealt with according to law, and th policeman, so being such policeman as aforesa such request of the defendant, then and there q laid his hands on the plaintiff for the cause said, and did then and there take the plaintif his custody, and did carry and conduct him the tiff from and out of the said house, to and alor said streets, highways, and places to the said station, for examination concerning the premises to be dealt with according to law, and on that oc the plaintiff was necessarily and unavoidably i soned, and kept and detained in prison for the of time in the introductory part of this plea menti as he lawfully might for the cause aforesaid, are the same supposed trespasses in the introdu part of this plea mentioned. Verification. Replic de injuriâ.

The cause was tried before *Parke* B. at the C *hall* sittings after last *Trinity* term. The jury fo verdict for the plaintiff for 150*l.* on the general i and for the defendant on the special plea, subje leave to move to enter a verdict for the plaintiff, court above should be of opinion that that plea w supported in evidence. In *Michaelmas* term *Th* obtained a rule according to the leave reserve for judgment non obstante veredicto; against *Bompas* Serjt. showed cause in that term; and

hearing *Thesiger* in support of the rule, the court took time to consider. It has seemed unnecessary to report the facts and arguments, as they are so fully stated in the following judgment of the court, delivered on the first day of this term by

PARKE B.—This was an action of trespass and false imprisonment, tried before me at the sittings after *Trinity* term last, at *Guildhall*. The declaration was for an assault and false imprisonment; to which there was a plea of not guilty, and a special plea of justification, on the ground that the plaintiff was guilty of a breach of the peace in the defendant's dwelling-house, and that he thereupon gave him in charge to a policeman, who was not averred to have had view of the breach of the peace. To this special plea, there was a replication of de injuriâ suâ propriâ absque tali causâ. On the trial the jury found a verdict for the plaintiff on the general issue, and for the defendant on the special plea, as I was of opinion that the material parts of it were proved; but as it appeared to me that the plea was bad in law, I directed the jury to assess damages on the general issue; and I also gave the plaintiff permission to move to enter a verdict for him on the special plea, if the court should be of opinion that it was not substantially proved. A rule nisi having been obtained to enter a verdict for the plaintiff, or judgment non obstante veredicto, the case was fully argued before my brothers *Bolland*, *Alderson*, *Gurney*, and myself, in last term. We have since considered the case, and are of opinion that the rule ought not to be made absolute, but that there should be a new trial, unless the parties will consent to enter a stet processus.

The facts of the case, as to which there was little or rather no contradictory evidence, may be very shortly stated:—The defendant was a linen-draper;

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the plaintiff was passing his shop, and seeing an a in the window with a ticket apparently attached denoting a low price, sent his companion in to b the shopman refused, and demanded a larger the plaintiff went in himself, and required the a at the lower rate; the shopman still insisted greater price; the plaintiff called it an imposi some of the shopmen desired him to go out of the in a somewhat offensive manner; he refused without the article at the price he had bid for it shopmen pushed him out. Before they did so, h clared he would strike any man who laid hands o One of the shopmen (really supposing, or pretendi suppose this to be a challenge to fight) stepped and struck the plaintiff in the face, near the shop The plaintiff went back into the shop and returne blow, and a contest commenced, in which the shopmen took a part, and fell on the plaintiff. T was a great noise in the shop, so that the bu could not go on, many persons were there, and o about the street-door. The noise brought dow defendant, who was sitting in the room above when he came down he found the shop in disorder the plaintiff on the ground, struggling and scu with the shopmen; and this scuffle continued, in defendant's presence for two or three minutes. defendant sent for a policeman, who soon after came; in the meantime the plaintiff was taken ho by two of the shopmen, who however relinquished hold before the policeman came: and on his ar the plaintiff was requested by the defendant to go the shop quietly, but he refused, unless he firs tained his hat, which he had lost in the scuffle, was standing still in the shop, insisting on his rig remain there, and a mob gathering round the when the defendant gave him in charge to the po

man, who took him to the police station. The defendant followed, but on the recommendation of the constable at the station, the charge was dropped.

Upon these facts the plaintiff appears to have been in the first instance a trespasser, by refusing to quit the shop when requested, and so to have been the cause of the affray which subsequently took place; but the first act of unlawful violence and breach of the peace was committed by the shopman; that led to a conflict, in which there were mutual acts of violence, clearly amounting to an affray, the latter part of which took place in the defendant's presence, and the plaintiff was on the spot on which the breach of the peace occurred, and persisted in remaining there, under such circumstances as to make it probable that the breach of the peace would be renewed, when he was delivered by the defendant to the police officer, in the very place where the affray had happened.

The first question which arises upon the facts is,—Whether the defendant had a right to arrest and deliver the plaintiff to a constable? the police officer having, by the stat. 10 *Geo.* 4. c. 44. s. 4., the same powers as a constable has at common law.

It is not necessary for us in the present case to decide, whether a private individual who has seen an affray committed, may give in charge to a constable who has not; and whether such constable may thereupon take into his custody the affrayers, or either of them, in order to be carried before a justice, after the affray has entirely ceased, after the offenders have quitted the place where it was committed, and there was no danger of a renewal.

The power of a constable to take into his custody, upon a reasonable information of a private person under such circumstances, and of that person to give in charge, must be correlative. Now as to the authority of a

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constable, it is perfectly clear that he is not entitled to arrest in order *himself* to take sureties of the peace, for he cannot administer an oath; *Sharrock* v. *Hannemer* (a); but whether he has that power in order to take before a magistrate, that *he* may take sureties of the peace, is a question on which the authorities differ.

Lord *Hale* seems to have been of opinion that a constable has this power (b), and the same rule has been laid down at nisi prius by Lord *Mansfield*, in a case referred to in 2 *East's Pleas of the Crown*, 306, and by *Buller* J. in two others, one quoted in the same place, and another cited in 3 *Campbell's Nisi Prius Cases*, 421.

On the other hand, there is a dictum to the contrary in *Brook's Abridgment*, tit. *Faux Imprisonment*, which is referred to and adopted by Lord *Coke* in 2d *Institute*, 52, and by Lord *Holt* in 2d Lord *Raymond*, 1301. *The Queen* v. *Tooley* expresses the same opinion. Lord Chief Justice *Eyre*, in the case of *Coupey* v. *Henley* (c) does the same, and many of the modern text books state that to be the law; *Burn's Justice*, 26th ed. tit. *Arrest*, 258; *Bac. Abridgment* (D.) *Trespass*, 53; 2 *East's Pleas of the Crown*, 506; *Hawkins's Pleas of the Crown*, book 2. c. 13. s. 8.

Upon the present occasion, however, we need not examine and decide between these conflicting authorities; for here the defendant, who had himself immediately before witnessed an affray, gave one of the affrayers in charge to the constable, on the very spot where it was committed, and whilst there was a reasonable apprehension of its continuance; and we are of opinion that he was justified in so doing, though the constable had seen no part of the affray.

(a) Cro. Eliz. 375. Owen, 105, S. C. nom. *Scarrett* v. *Tanner*.

(b) 2d Hale's Pleas of the Crown, 89.

(c) 1 Esp. C. N. P. 540.

It is unquestionable that any bystander may and ought to interfere, to part those who make an affray, and to stay those who are going to join it, till the affray be ended. It is also clearly laid down, that he may arrest the affrayers, and detain them until the heat be over, and then deliver them to a constable. *Lambard*, in his *Eirenarcha*, ch. 3. p. 130, says, "Any man also may stay the affrayers until the storm of their heat be calmed, and then may he deliver them over to the constable, to imprison them, until they find surety for the peace; but he himself may not commit them to prison, unless the one of them be in peril of death by some hurt, for then may any man carry the other to the gaol, till it be known whether he so hurt will live or die, as appeareth by the statute 3 *Hen.* 7. c. 1."

In *Hawkins's Pleas of the Crown*, book 1. c. 63. s. 11., it is said, that it seems agreed that any one who sees others fighting may lawfully part them, and also stay them till the heat be over, and then deliver them to the constable, who may carry them before a justice of the peace, in order to their finding sureties for the peace; and pleas founded upon this rule, and signed by Mr. Justice *Buller*, when at the bar, are to be found in 9 *Wentworth's Pleadings*, 344, 345. And *De Grey* C. J. on the trial held the justification to be good.

It is clear, therefore, that any person present may arrest the affrayer at the moment of the affray, and detain him till his passion has cooled and his desire to break the peace has ceased, and then deliver him to a peace-officer. And if that be so, what reason can there be why he may not arrest an affrayer after the actual violence is over, but whilst he shows a disposition to renew it by persisting in remaining on the spot where he has committed it? Both cases fall within the same principle, which is, that for the sake of

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the preservation of the peace, any individual who sees it broken, may restrain the liberty of him whom he sees breaking it, so long as his conduct shows that the public peace is likely to be endangered by his acts. In truth, whilst those are assembled together, who have committed acts of violence, and the danger of their renewal continues, the affray itself may be said to continue: and during the affray, the constable may, not merely on his own view, but, on the information and complaint of another, arrest the offender, and of course the person so complaining is justified in giving the charge to the constable (a).

The defendant therefore had a right, in this case, the danger continuing, to deliver the plaintiff into the hands of the police-officer, unless the circumstance that the plaintiff was not guilty of the first illegal violence makes a difference. Now at the time the defendant interfered, if he was ignorant of that fact he saw the plaintiff and others in a mutual contest; and that mutual contest the law gave him power to terminate, for the sake of securing the peace of his house and neighbourhood, and the persons of all those concerned from violence: and if he had the power to arrest all, he was justified in securing any one, not absolutely, but only until a magistrate could inquire into all the circumstances on oath, and bind over one party to prosecute, or the others to keep the peace, as upon a review of all the circumstances he might think fit. If no one could be restrained of his liberty, in cases of mutual conflict, except the party who did the first wrong, and the bystanders acted at their peril in this respect, there would be very little chance of the public peace being preserved by the interference of private individuals, nor indeed of peace-officers, whose

(a) See Lord Hale's Pleas of the Crown, 2d vol. p. 89.

power of interposition on their own view, appears not to differ from that of any of the king's other subjects.

For these reasons we are of opinion, that the defendant was, upon the facts in evidence, justified in delivering the plaintiff to the police-officer.

This brings me to the second question, whether the plea upon the record was substantially proved? I thought upon the trial that it was; but upon further consideration, I concur with the rest of the court in thinking that it was not. The plea was as follows: "And the defendant says that before and at the said time when &c. the said defendant was lawfully possessed of a certain dwelling-house in the city of *London* and the said defendant being so possessed thereof the said plaintiff just before the said time when &c. entered and came into the said dwelling-house and then and there with force and arms made a great noise disturbance and affray therein and then and there insulted abused and illtreated the defendant and his servants in the said dwelling-house and greatly disturbed and disquieted them in the peaceable and quiet possession of the said dwelling-house in breach of the peace of our said lord the king whereupon the defendant then and there requested the plaintiff to cease his said noise and disturbance and to depart from and out of the said house which the plaintiff then and there wholly refused to do and continued in the said house making the said noise and disturbance and affray therein whereupon the defendant in order to preserve the peace and restore good order and tranquillity in the said house then and there gave charge of the plaintiff to a certain policeman of the city of *London* and then and there requested the said policeman to take the plaintiff into his custody to be dealt with according to law and the said policeman so being such policeman as aforesaid at such request of the defendant then and there quietly laid his

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hands on the plaintiff for the cause aforesaid and did then and there take the plaintiff into his custody." The replication puts in issue all the allegations constituting the ground of the arrest, and of these it is not necessary to prove all; it is enough to establish so many of them as would justify the arrest. It is not enough to prove facts which justify the imprisonment; it is necessary to prove such of the facts *alleged* as would do so. The *allegations* which were proved were, the entry into the defendant's house, the assault on his servants, the disturbance of the defendant in his possession of the house by an affray in it, in which the plaintiff bore a part, just before the time of the arrest, and that the defendant gave the plaintiff in charge, in order to preserve the public peace; but the fact of an assault on the plaintiff himself was not proved, and that is the only breach of the peace which in the plea appears by necessary implication to have been committed in the plaintiff's presence; for in none of the other alleged facts is the plaintiff's presence asserted, or necessarily implied, before the moment of actual interference. The disturbance of the defendant in the possession of his dwelling-house might have occurred by an entry in his absence; and therefore that averment does not by necessary implication assert the defendant's presence. If so, the substance of this plea, that is, so many of the *allegations* in it as constituted a defence, was not proved, as the assault on the defendant himself was not proved.

For this reason we think that the proof failed: but as this is a case in which an amendment would have been allowed by virtue of the late statute, it being clear upon the facts that there was a defence, on the ground of the defendant's right to arrest for *a breach of the peace in his presence;* and as the declaration of my opinion, that the plea was substantially proved at the

time, probably prevented an application to amend, we think there should be a new trial, when or before which the plea may be amended: and as ultimately there will be a verdict for the defendant if the same evidence is adduced, the best course will be for the parties to agree to enter a stet processus.

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STEPHENS *against* FOSTER and Another.

THE transaction in which these causes originated was the same as that detailed in *Haynes* v. *Foster* (a). The first cause was assumpsit on several bills

(a) *Ante*, Vol. IV. 65.

Wood & Poole were bill-brokers in *London*. Messrs. *Fosters*, merchants and capitalists, had large transactions with them. *W. & P.* were possessed of bills amounting to nearly 3000*l.* which had been placed in their hands by different customers to raise money on for the latter. *W. & P.* having mixed these bills with others belonging to themselves, handed over the whole to the defendants as a security for 3000*l.* then advanced, as well as for two sums of 2000*l.* and 550*l.* previously advanced them, on their engagement to give bills to cover the amount in a short time. It was proved to be customary for bill-brokers in *London* to pledge the bills of their various customers together for an advance to themselves of one gross sum on all them, or even to pledge them as a security for former advances made to the bill-brokers; and that each customer looked only to the bill-broker, to whom he had given dominion over his bill.

An action of assumpsit having been brought by Messrs. *Fosters* on one of the bills thus handed over by *W. & P.* against one of *W. & P.*'s customers, whose name was on it, the judge left it to the jury to say, whether the plaintiffs took the bills from *W. & P.* the bill-brokers with due caution and in the ordinary course of business? The jury were of opinion in the affirmative, and found a verdict for the plaintiffs. Held, that the direction was right.

An action of trover was brought by a customer (himself a bill-broker) against Messrs. *Fosters*, to recover the value of some of the bills thus handed over to them. The judge told the jury, that a bill-broker being an agent for the purpose of getting bills discounted, has by the general law no right to mix bills received by him from his customers merely to get discounted, with bills of other customers, and to pledge the whole in a mass, in order to obtain a loan of money to himself: and still less has he a right to deposit bills received merely for the purposes of discount, as security or part security for money previously due from him; but added, that parties might, by contract between themselves, avoid that general rule of law. He then left it to them to say, whether the usage alleged to exist in *London*, viz. that by putting a bill into a bill-broker's hands the customer gives him an absolute dominion over it, to do with it as he likes, looking to the credit of the bill-broker only

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of exchange, and at the trial at the *London* sittings after *Trinity* term 1832, before *Bolland* B. the plaintiffs had a verdict. In the next *Michaelmas* term a rule for a new trial, or reduction of damages, was obtained by *John Williams*. In the second cause, trover for certain bills, which was tried at the *London* sittings after *Hilary* term 1834, before Lord *Lyndhurst* C. B. the defendants obtained a verdict, and in the succeeding *Easter* term *Bompas* Serjt. for the defendants, obtained a rule for a new trial. In *Trinity* term 1834 *Wilde* and *Coleridge* Serjts. and *R. V. Richards*, the counsel for the plaintiffs in *Foster* v. *Pearson and others*, were stopped by the court. After *Erle* and *Crompton* had supported the rule for those defendants, the court declared they would hear *Stephens* v. *Foster* before they gave judgment. In last *Michaelmas* term, *Wilde* and *Coleridge* Serjts. and *R. V. Richards* for the defendants, were stopped by the court. *Bompas* Serjt. *Crompton* and *Dowdeswell* supported the rule. The court having intimated that they entertained no doubt upon their decision, said, that they would nevertheless take time before they pronounced it, in order that a question of so much importance should be disposed of in the most deliberate manner. It has been thought superfluous to

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as the person responsible either for the money or the return of the bill, was proved to their satisfaction, and they thought it was, whether they thought that the plaintiff, who was himself a bill-broker, had contracted with reference to that usage. The jury found for the defendants, the court refused to disturb the verdict.

The duty of a bill-broker is one which depends entirely on the course of dealing. His powers may vary in different places, and are questions of fact to be resolved by the course and usage of dealing in the particular place.

Semble, The rule of law, "That the holder of bills of exchange indorsed in blank, or other negotiable securities transferable by delivery, could give a title which he himself did not possess to a bona fide holder," is not to be departed from, or qualified by adding, as an essential ingredient, that the person taking the bills should take them with due care and caution; unless his absence of caution should affect the bona fides of the transaction.

As to the power of a bill-broker to pledge his customer's bills for an antecedent debt of his own, *quære*.

insert the facts or the able arguments of the different counsel, as they are so fully detailed in the judgment itself.

Cur. adv. vult.

On the first day of this term the judgment of the court was delivered by

BARON B.—These two cases were argued before Lord *Lyndhurst*, my brothers *Bolland* and *Gurney* and myself, in *Trinity* and *Michaelmas* terms last, and stood over, not on account of any doubt that we felt at the time, but in order that the judgment of the court upon a subject of much importance might be pronounced after due deliberation. The facts of these cases, both of which, as well as that of *Haynes v. Foster*, arise out of the same transaction, may be stated in a few words:—Messrs. *Fosters*, who are merchants, had large transactions with *Wood* and *Poole*, bill-brokers, in the city of *London*. On *Monday*, 14 *November* 1831, *Wood* and *Poole* applied to them for an advance of 2000*l.*, offering bills as a security; Messrs. *Fosters* refused the bills offered, but advanced on that day the sum required, on an engagement by *Wood* and *Poole* to give bills to an adequate amount as a security in a short time. On the 15th or 16th a further sum of 550*l.* was lent on the same terms; and on *Saturday* the 19th of *November*, *Wood* and *Poole*, in consequence of Messrs. *Fosters* requiring them to fulfil their engagement, placed bills to the amount of 5928*l.* 7*s.* as a security for the previous advance, and for a further loan of 3000*l.* then made by Messrs. *Fosters* to them. There was contradictory evidence as to the time of this transaction; the jury found it to have taken place on the *Saturday*; and as my Lord Chief Baron was satisfied with that finding, we must assume that it took place on that day. Among the bills so handed to Messrs. *Fosters* were

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some to the amount of 502*l.* 18*s.* the property of Mr. *Pearson*, a defendant in the first-named action, (comprising one for 192*l.* drawn upon one *Butt*,) and also a bill belonging to Mr. *Stephens*, the plaintiff in the last-named action; and other bills, the subject of the suit in *Haynes* v. *Foster*, formed a part of the same deposit. The whole of the bills belonging to others were less than 3000*l.* in amount, and they had been previously placed by their respective proprietors in the hands of *Wood* and *Poole*, to be dealt with in their character of bill-brokers, for the benefit of their employers. There was evidence on the trials of both the cases now under consideration, from numerous witnesses, that it was the usage of bill-brokers in the city of *London* not merely to discount or pledge the bills of each customer by themselves, for an advance on those bills only, but also to pledge bills of various customers together, for an advance upon all of one gross sum; or even to pledge them as a security for antecedent advances made to the bill-brokers; and it was deposed, that such was the known course of dealing in that city.

In the first case, in which the principal defence was, that the Messrs. *Fosters* had taken all the bills of Mr. *Pearson*, under such circumstances as did not entitle them to sue upon them, the learned judge, my brother *Bolland*, left it to the jury to say, whether the plaintiffs took the bills from *Wood* and *Poole* with due care and caution, and in the ordinary course of business; and the jury were of opinion that they did. A rule nisi was moved for and obtained, on the ground that the verdict was against the evidence, and also on two other grounds; one, the receipt of improper evidence; the other, that the plaintiffs had at all events no title to the bill for 192*l.*; and that the verdict, therefore, ought to be reduced to that amount.

In the second case, in which Mr. *Stephens*, who was

himself a bill-broker, was the plaintiff, and sought to recover the amount of a bill from Messrs. *Fosters*, on the ground that they had acquired no title to it, by the deposit of *Wood* and *Poole*, Lord *Lyndhurst* told the jury, that a bill-broker (being an agent for the purpose of getting bills discounted) has *by the general law* no right to mix a bill which he receives from one customer with bills which he receives from another, and pledge all for a gross sum; nor to pledge a bill which he receives for the purpose of discount, as a security for a past debt; but that, notwithstanding the general law, the parties might contract in any way they thought proper, and the customer give to the bill-broker more extended power. The defendant having in that case insisted that there was a known usage or course of dealing in the city of *London* that when a bill is put in the hands of a bill-broker, a customer gives him an absolute dominion over the bill to do with it as he likes, looking to the credit of the bill-broker only as the person responsible, either for the money or for the return of the bill, his lordship told the jury that they were to consider whether that usage was proved, to their entire satisfaction, to be universally prevalent in the city of *London;* and if so, whether they thought that the plaintiff contracted with *Wood* and *Poole* according to that usage; that is, whether in delivering the bill to them he intended to give them an entire dominion over it to do with it as they thought proper, looking to Messrs. *Wood* and *Poole*, and their responsibility for their security, either to have the money from them, or the bill back, if they had not the money. The learned counsel for the defendants tendered a bill of exceptions to the summing up of the Lord Chief Baron, so far as it related to the general law, on which it became unnecessary to proceed, as the jury found a verdict for the defendants.

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A rule nisi was obtained, on the part of the plaintiff for a new trial, on the ground that this verdict was against the evidence; and on showing cause against this and the rule in the other case, the questions in both were ably and elaborately argued.

With respect to the first action, the court has already given some intimation of its opinion upon two of the grounds upon which the rule nisi was obtained: it will now be best to dispose of them altogether, and thus reduce the questions to one, which is nearly the same in both cases.

As to the receipt of improper evidence, it appears that the learned judge admitted a note written by *Wood* and signed by *Poole*, addressed and sent to the defendant *Pearson*, and containing an account of the transaction similar to that which *Wood* gave on the trial; but it was admitted not as proof of the facts therein stated, nor as confirmatory of *Wood's* testimony (for either of which purposes it would have been inadmissible), but only as proof of *notice* of those facts to the defendant, in order to found an argument upon it that he, by receiving a sum of money from *Wood* and *Poole*, and afterwards arresting them for another sum, had sanctioned and adopted their deposit of the bill in question, as stated in the letter. For this purpose the document was legally admissible, and therefore this objection cannot prevail.

Another of the grounds upon which the rule was obtained, was, that the verdict ought to be reduced by the amount of the bill for 100*l.* on Paris, to which it was contended, that the plaintiffs had in all events no title. This bill, it appeared, was placed among those delivered to the plaintiffs on the 19th *November*. On the following *Monday*, the 21st, this and all the other bills were delivered back by the plaintiffs to

Messrs. Wood and *Poole*, in order that a list might be made out by them. *Wood* withdrew the bill in question from the rest, and, without the consent of the plaintiffs, pledged it with *Roberts* & *Co.*, and he informed the plaintiffs on the same day that he had substituted another bill for it. The plaintiffs complained, and *Wood* promised to get the bill back, and he did so from Messrs. *Roberts* & Co. by satisfying their claim, and re-delivered the bill to Messrs. *Fosters* on *Thursday*, after the stoppage of *Wood* and *Poole*.

It was argued for the defendant, that the plaintiffs' title to the bill commenced on the re-delivery, and if so, at that time he could not be a bonâ fide holder for value, as *Wood* and *Poole* had then become notoriously insolvent. But it is quite clear that the plaintiffs' title did not commence on the second, but on the first delivery of the bill to them. And when it was returned by the plaintiffs to *Wood* for a special purpose, his possession was theirs, and though the act of pledging the bill by *Wood* with *Roberts* & Co. was a conversion by *Wood*, it was only a conversion by election. The plaintiffs had a right thereupon either to consider *Wood* as a wrong-doer and recover damages from him for the wrong, or to waive the loss, and treat the property in the bill as still being their own; Messrs. *Roberts* & Co. might certainly have held the bill, if they, as no doubt they did, obtained the bill under such circumstances as gave them a right to hold it; but as their title was at an end by their re-delivery to *Wood*, that no longer interposed any difficulty in the way of the plaintiffs' title to the bill. On the removal of that difficulty the plaintiffs were remitted to their original right.

These objections being disposed of, I now come to the principal question in each case, viz. whether the verdict was against the evidence.

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In the case of *Foster* v. *Pearson* the learned jud as has been before stated, left it to the jury to dec whether the plaintiffs took the bills with due care caution and in the ordinary course of business, and jury found that they did. Of the mode in which question was left, the defendant has certainly no ri to complain: but if the verdict had been in his favo it would have become necessary to consider whet the learned judge was right in adopting the rule fl laid down by the court of Common Pleas, in the cas *Snow* v. *Peacock* (a), and which was founded upon dicta rather than the decision of the judges of King's Bench in the case of *Gill* v. *Cubitt* (b), m especially since the opinion of the latter court has b so strongly intimated in the late cases of *Crook Jadis* (c) and *Backhouse* v. *Harrison* (d). The rule law was long considered as being firmly establish that the holder of bills of exchange indorsed in bla or other negotiable securities, transferable by deliv could give a title which he himself did not possess bonâ fide holder for value: and it may well be qu tioned whether it has been wisely departed from in case to which reference has been made, and other s sequent cases, in which care and caution in the ta of such securities has been treated as essential to validity of his title, besides and independently of hon of purpose. It is unnecessary, however, to decide question at present; when it arises, as it will prob do under the new rules of pleading, on the rec itself, it will be proper that it should be conside and finally decided with due deliberation.

Assuming then that the direction of the learned ju was proper, the objection is, that on the evidenc

(a) 3 Bing. 406.
(b) 3 B. & Cr. 466.
(c) 3 N. & M. 257.
(d) Id. 188.

was not established that the transfer of the bills to the plaintiffs was made to them in the ordinary course of trade, and that they exercised due care and caution."

The argument for the defendants was founded on the authority of *Haynes* v. *Foster*, which case, it was contended, established this proposition as a *rule of law*, that a bill-broker, who receives a bill merely for the purpose of getting it discounted for his customer, has no right to mix it with bills of his other customers, and to pledge the whole mass; still less to deposit such bills as a security, or part security, for money previously due from him. It was insisted that it was dangerous to admit this rule of the general law to be varied by proof of a custom in a particular place, and that the usage set up by the plaintiffs was at variance with the relation of the parties, and therefore void; that it was either too large or too narrow; that if it went the length of allowing the broker to pledge for his own prior debt, it was bad in point of law, as being inconsistent with his character of agent; and if it did not go so far, it was not sufficient for the purposes of this case, and did not authorize the transaction in question. And it was further urged, that if the usage was not invalid, at all events it was not proved by clear and satisfactory evidence.

In answer to this argument it is to be observed, that so far as it relates to the power of a bill-broker to pledge the bills of his customers for an antecedent debt of his own, it is beside the present case and that of *Foster* v. *Pearson*, for two reasons; first, because, although the deposit of all the bills was made for the double purpose of securing the past debt and the present advance, yet the amount of customers' bills pledged was less than the actual advance made. Therefore, assuming, for the sake of argument, that the plaintiffs, who knew that *Wood* and *Poole* were bill-brokers,

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ought to have inquired which were customers' bills, and which were not, and that having neglected to do so, they are to be held to be in the same situation as if they knew the real state of the facts, the result would be the same as if they had knowingly taken a pledge of bills of *Wood* and *Poole* to the amount of 4000*l.*, and the property of their customers to the amount of 2000*l.*, expressly to secure an old debt of *Wood* and *Poole* of 2500*l.*, and a fresh advance of 3000*l.*; and on that supposition there could not be any doubt but that they would have had a lien on all for their advance, and on *Wood* and *Poole*'s own bills for the old debt. In such a case there would not have been any such fraud or illegality as would have vitiated the whole transaction with respect to the customers' bills, but the customers would have had a right jointly to redeem them on payment of the sum advanced only.

A second reason why it is unnecessary to decide in this case upon the validity of the usage for a bill-broker to pledge for his antecedent debt, is this, that assuming the broker to have no such power between him and his employer, or as to third persons who receive the bills with knowledge of all the facts, it by no means follows that in the present case Messrs. *Fosters* would not have a right to hold the bills; for the question here is, whether they took the bills with due care and caution and in the ordinary course of business. The jury have found that they did, and can we say that they did not, even though we should think that the broker had not a right so to pledge the customers' bills? Messrs. *Fosters* might have supposed that *Wood* and *Poole* were acting rightly in pledging their customers' bills, even if they knew them to be such, for the prior advance, because *Wood* and *Poole* might have given to those very customers a part of the 2500*l.*, the amount of that prior advance. Were Messrs. *Fosters*,

men of business using due care and caution, bound to ask *Wood* and *Poole* not only whether any and which were the customers' bills, but whether they had made any advances out of the loan to them, or otherwise, and to what amount, on any of those bills? Whether such a course ought to have been pursued by men of business, was entirely a question for the jury.

The validity of the alleged usage, so far as relates to the power to pledge for an antecedent debt, being therefore out of the question in this case, it remains to consider, whether there is any objection to the verdict, on the ground that the residue of the alleged usage was either invalid in point of law, or defectively proved. The judgment in the case of *Haynes* v. *Foster* is treated in the arguments for the defendant as establishing that it is a sort of *legal incident* to the character of a bill-broker, that he is to pledge the bills of each customer separately; but we think that such is not the fair meaning of the judgment, but that it is to be taken in connection with the evidence, and that all that was intended was this,—that in the absence of evidence as to the nature of such an employment, a bill-broker must be taken to be an agent to procure the loan of money on each customer's bills separately, and that he had therefore no right to mix bills together and pledge the mass for one entire sum. In truth a bill-broker is not a person known to the law with certain prescribed duties, but his employment is one which depends entirely upon the course of dealing. It may differ in different parts of the country, it may have bounds more or less extensive in one place than in another. What is the nature of its powers and duties in any instance is a question of fact, and is to be determined by the usage and course of dealing in the particular place.

A great body of evidence was adduced in the present case to prove that it was the course of dealing in the

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city of *London*, for bill-brokers to raise money for their employers, by pledging the bills of different proprietors for one entire advance; and there is nothing unreasonable in such a practice. On the one hand it is attended with inconvenience, because one proprietor may have to answer for the non-payment of another's bill; but, on the other hand, it may give facilities to the raising of money on negotiable paper, for it may well happen that a great capitalist would advance money in this way who would not discount each particular bill. But, at any rate, it is found to be the ordinary usage and practice so to dispose of bills; and the question in the case being, whether Messrs. *Fosters* acted with due care and caution, and in the ordinary course of business, in receiving those bills, how can it be said that the jury were wrong in finding what they did, when there was such a body of evidence to show that they acted precisely in the same way that bankers and other merchants of respectability were in the habit of acting,—men who must be presumed to conduct their affairs with ordinary care and due circumspection? What greater caution can be required from any man of business? what different conduct can be expected than that which other men of business, character, and intelligence, employ in similar transactions? What better criterion can be found of ordinary care than that measure of care ordinarily used by other persons in the same department of trade, similarly situated?

This was a question entirely for the consideration of the jury; they have decided upon it, and we cannot say their decision is wrong. It is true that it is at variance with the conclusion to which the jury came in *Haynes* v. *Foster*; but in that case there was no such evidence of the ordinary course of dealing as there was in this. It remains to consider whether there is any

difference between the case of *Foster* v. *Pearson* and that of *Stephens* v. *Foster*.

The question was not left to the jury in the same way in the latter as in the former case. It was put on the ground that the jury might infer from the usage proved, and its general notoriety, that the customer employed the bill-brokers with reference to that usage, and therefore authorised them to deal with the bills as they in fact did; and the jury were satisfied with the evidence, and did draw the inference that Messrs. *Wood* and *Poole* had authority, as between them and their employers, to pledge the bills in the manner it which it appeared that they did.

It was argued for the plaintiff, that the usage given in evidence was not sufficient to prove such a right as between bailor and bailee, and more particularly to deposit bills of the bailor as security for an antecedent debt due from the bailee. This was the principal objection, and it may be removed from this case as well as from the other, for it has been shown to be unnecessary to the title of Messrs. *Fosters* to establish the usage to that extent; because an advance was made at the time to an amount exceeding that of the customers' bills. So far as the usage tends to show an authority to pledge bills in a mass, and not separately, its reasonableness is hardly disputed; and that question has also been already disposed of. It was proved to be the prevailing practice, and it is enough for us to say the jury were warranted in drawing the inference which they did, as the plaintiff was himself a bill-broker.

Indeed the question in this case was left to the jury in a manner which gives the plaintiff no right to complain; if the verdict had been the other way, the defendants might possibly have done so with success; for whether the plaintiff actually or by implication authorized the brokers so to deal with the bills or not,

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still if the defendants took the bills for value, and honestly and with due care and caution, in the ordinary course of business, (and even that is probably an unnecessary qualification,) they would have a good title to hold them; and less evidence of the practice of men of business would most likely have satisfied the jury, if this had been the question left to them, than was necessary to raise the inference of an authority as between principal and agent.

We are therefore of opinion that both these rules must be discharged.

Rules discharged.

WHITAKER *against* The GOVERNOR and COMPANY of the BANK OF ENGLAND.

The plaintiff, who kept an account with the bank of *England* as private bankers, accepted a bill payable there, which was refused payment at eleven o'clock in the morning of the day it became due, for want of sufficient assets.

CASE. The declaration stated, that heretofore and before the committing of the grievance by the defendants as hereinafter mentioned, the plaintiff exercised, used, and carried on the trade or business of a corn and flour-factor with punctuality and integrity, always well and truly and punctually paying and discharging his just debts, and until the time of the committing the grievance by the defendants, as hereinafter mentioned, had never been suspected of being unable or unwilling to pay and discharge the same. That also

It was presented there again by a notary at six in the evening, after the usual hours for payment of bills at the bank had elapsed, but a party left at the bank gave the same answer as in the morning, though in the course of the day a sum sufficient to answer the bill had been paid in. The plaintiff sued the bank, not for neglecting to inform the notary that they had received assets since the former presentment, and that the bill would be paid the next day, but for dishonouring the bill, though they had had sufficient assets in their hands to pay it, and for a time sufficiently long to enable them and their clerks to know that fact: Held, that in the absence of proof of specific agreement to the contrary, the defendants were not bound to pay the bill on its last presentment, that being made after the usual hours of business; and were therefore not liable to the action.

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drawing-office in the bank of *England* aforesaid for payment thereof previously to the same becoming due, such cash balance being sufficient for that purpose, over and above any claim or lien of the said defendants thereon, and independently of any right which the said defendants might have to retain the same, or any part thereof, in their hands: and such cash balance having then been in their hands a sufficient and reasonable time to enable them and their clerks and servants to know of the same being in the hands of the said defendants, and that the same was sufficient for the purpose of paying such bill or bills, over and above any claim or lien of the defendants thereon, and independently of any right that the said defendants might have to retain the same or any part thereof in their hands: and the said plaintiff further saith, that heretofore, and whilst the said plaintiff was such customer of and retained and employed the said defendants as such bankers as aforesaid, to wit, on the 15th day of *December* 1832, the said persons so using the stile and firm of *Cooke* and *Gambling* as aforesaid, made their certain bill of exchange in writing, and directed the same to the plaintiff, and thereby required the plaintiff to pay, six weeks after the date thereof, to one *S. Bignold* or order, 425*l.* value received; and the plaintiff then and there accepted the said bill, and thereby made the same payable at the bank of *England*; and the said *S. Bignold* then and there indorsed the same to Messrs. *Masterman* & Co., who, at the time when the said bill became due and payable, were the persons entitled to the same, and to receive the amount thereof: and the said plaintiff further saith, that afterwards and when the said bill became due and payable, according to the tenor and effect thereof, to wit, on the 29th *January* 1833, the said bill of exchange was duly presented at the bank of *England* aforesaid for payment

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also to the said Messrs. *Cooke* and *Gambling*; and by reason and in consequence thereof the said plaintiff was greatly injured and wholly ruined in his credit and circumstances, and was then and there suspected by the said Messrs. *Cooke* and *Gambling*, and by the said *A. Bayfield* and by the said *S. Cooke*, and the said other persons who then and there had been and were in the habit of employing and dealing with him in his said business, to be in bad, failing, and insolvent circumstances, and by reason and in consequence of the premises then and there refused, and from thence hitherto have ceased and refused to employ or deal with the said plaintiff in the way of his said trade and business as a corn and flour-factor, as they otherwise would have done, and thereby the said plaintiff hath lost and been deprived of divers large gains and profits which he might and otherwise would have gained and acquired by reason of being so employed and dealt with by the said Messrs. *Cooke* and *Gambling*, and by the said *A. Bayfield* and the said *S. Cooke*, and the said other persons, amounting to a large sum of money, to wit, the sum of 5000*l.*: and also by means and in consequence of the premises, divers persons, being creditors of the said plaintiffs for divers large sums of money respectively, amounting to a large sum of money, to wit, 10,000*l.*, then and there pressed the said plaintiff for the payment of their respective debts, and the said plaintiff was then and there forced and obliged, in order to endeavour to pay the same, to sell and dispose of divers goods and chattels of him the said plaintiff for a much less sum of money than he might and otherwise would have obtained for the same, to wit, 5000*l.* less than he might and otherwise would have obtained for the same: and the said plaintiff was then and there forced and obliged to compound with his said creditors, and hath been by means and in consequence of the

premises wholly ruined in his credit, character, and circumstances, and hath lost his connection and business, and been hindered and prevented from gaining any profits or emoluments therefrom, as he otherwise might and would have done: and the said plaintiff hath been and is by means and in consequence of the premises otherwise greatly injured and damaged.

Pleas: First, that at the time when the said bill of exchange in the said declaration mentioned was presented and shown to them the said defendants for payment thereof, they the said defendants had not in their hands a cash balance of and payable to the plaintiff sufficient for the purpose of paying the said bill of exchange in the said declaration mentioned, in manner and form as the said plaintiff hath above in his said declaration in that behalf alleged. Secondly, that at the time when the said bill of exchange in the said declaration mentioned was presented and shown to them the said defendants for payment thereof, the said supposed cash balance in the said declaration mentioned had not been in their hands a sufficient and reasonable time to enable them and their clerks and servants to know of the same being in the hands of the said defendants, and that the same was sufficient for the purpose of paying the said bill of exchange. The plaintiff in his replication took issues on these pleas.

At the trial before *Parke* B. at the *Middlesex* sittings after last term, the following facts appeared. The plaintiff, a flour-factor, kept cash at the bank of *England*, and accepted the bill mentioned in the declaration, making it payable there. On the 29th *January* 1833, when it became due, it was in the hands of Messrs. *Mastermans*, who presented it at the bank at not later than half-past nine in the morning, and left it there for examination till eleven o'clock, when it was returned to them marked "N. S.," viz. not sufficient

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effects. At three o'clock in the afternoon of the preceding day there was a balance of 33*l.* 13*s.* 8*d.* cash in the bank in the plaintiff's favour. A cheque on a *London* banker for 200*l.* was afterwards paid in to his account on that day, but having been so paid in after three o'clock, was, according to the course of business of the bank, "entered short," viz. passed to his account without giving credit for it till the following morning, the 29th, before eleven o'clock at the latest. On the 29th the plaintiff paid in another sum of 195*l.* in cash to his account, and the precise time when he so paid in this latter sum was the great question in dispute at the trial. The plaintiff's witness swore, that being at the bank that morning on his own business he saw the plaintiff pay in money there at a quarter after ten, and that they left the bank together. For the defendants several bank clerks swore, after examining the hand-writing of the entries in their books, that the cheque could not possibly have been paid in by the plaintiff before five minutes to twelve o'clock on the 29th *January*. The bank does not pay bills after five, but a clerk is left at the office to give answers, if any are presented after that time. After six on the same evening a notary again presented the bill at the bank, when the same answer was given as in the morning, "not sufficient effects." On the 30th, in consequence of a communication from the bank to Messrs. *Mastermans*, the latter got the bill from the notary, took it to the bank, who paid it, as well as the 1*s.* 6*d.* for noting, and never charged the latter sum to the plaintiff. But the *Mastermans* had previously prepared a letter to *Bignold*, in which they stated the fact of the plaintiff's bill having been returned, and that the answer was, "not sufficient effects," but though they afterwards added to that letter the words "since taken up," the plaintiff's loss of credit stated in the declaration was

proved. The learned baron told the jury, that whether the acceptor of the bill might not have paid the bill at any time on the 29th, was not the question on the pleadings; that, as between principal and agent, the presentment of the bill on that day after the banking hours for payment had expired, was not sufficient to support the present action against the defendants, they as agents, not being bound to pay the bill after five o'clock; but that the bill was in course of presentment from half-past nine till eleven o'clock, during which time it was left with the defendants, and the main question for them was, whether the plaintiff had sufficient funds at the bank at a reasonable time before eleven o'clock on 29th *January*. He added, that with reference to the issues raised by the pleadings, the jury must be satisfied, not only that the plaintiff had a sufficient balance in the bank at eleven o'clock, but that it had been there a reasonable time before that hour, so as to have enabled them to have knowledge of the fact (*a*). The jury found a verdict for the defendants.

Thesiger moved for a new trial, on the ground that the jury ought to have been directed that the defendants were bound to pay the bill on the evening of the 29th, when it was presented by the notary. *Parker* v. *Gordon* (*b*), and *Elford* v. *Teed* (*c*), show the general distinction between the presentment of bills made payable at a banker's, and of those made payable at a private person's house; and, notwithstanding *Leftley* v. *Mills* (*d*), where the court refused to take notice of banking hours, it must now be admitted that bills

(a) He also intimated that the defendants should have left some minute on the 29th to inform the notary that the bill would be paid the next day, but said, that as they had not done so, they might think it right to pay the 1*s.* 6*d.* for the noting which had taken place.

(b) 7 East, 385. (c) 1 M. & S. 28. (d) 4 T. R. 170.

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payable at a banker's must be presented within those hours, though in all other cases it is sufficient to present a bill within reasonable hours. In *Barclay* v. *Bailey* (*a*) a presentment at the counting-house of the acceptor, a merchant residing in *London*, at eight o'clock in the evening of the day it became due, was held sufficient to charge the drawer. So in *Wilkins* v. *Jadis* (*b*), the bill being accepted payable at "No. 15, *Godliman Street, Doctors' Commons*," viz. in the *city* of *London*, a presentment there between seven and eight in the evening was held good as against the drawer; *Parke* B. adding, that eight in the evening was in that case a reasonable hour. *Morgan* v. *Davison* (*c*) is to the same point. But though presentment ought to be made within banking or reasonable hours of the day when the bill is payable, still, if it be made after those hours have elapsed to a person stationed there by the acceptor for the purpose of giving an answer, the presentment is good to charge the acceptor. In *Garnett* v. *Woodcock and others* (*d*) the action was against the drawer of a bill which was accepted payable at a *London* banker's. The presentment was between *seven* and *eight* in the evening. A boy returned for answer "no orders." The presentment was held good, for the answer returned was the same as it would have been had the presentment been made within the hours of business. Lord *Ellenborough* said at nisi prius, "Bankers do not usually pay at so late an hour, but if a person be left there who gives a negative answer, there is no difference between the case and a presentment at a merchant's. I think it is perfectly clear, that if a banker appoint a person to attend in order to give an answer, a presentment would be sufficient if it were made before twelve at night."

(*a*) 2 Camp. 527. (*b*) 2 B. & Adol. 188.
(*c*) 1 Stark. C. N. P. 114.
(*d*) 6 M. & S. 44. 1 Stark. C. N. P. 475, *S. C.*

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tended, that the verdict was against the weight of evidence, which went to prove that the plaintiff's balance in the defendants' hands at eleven o'clock on the 29th was sufficient to pay the bill.

Lord ABINGER C. B.—There was evidence on both sides, but as, in our opinion, that in favour of the defendants rather preponderated, no new trial can be granted on that ground. That question was for the jury, who have decided it. As to the alleged misdirection, I do not think the point insisted on for the plaintiff altogether applies to the subject-matter in issue. For the question on the pleadings comes to this, whether the presentment by the notary at six o'clock in the evening of the 29th made the defendants liable to pay the bill at that time, they having then assets sufficient, of which they were aware? Their error, if any, was not in omitting to pay the bill when it was so presented by the notary, but in not then telling him that, since it was presented in the morning, they had received a sufficient deposit of assets to meet it, and that it would be paid next day. That issue does not arise on these pleadings; and, with reference to that actually in issue, it was proved to be the universal practice of the bank not to pay bills after five o'clock; while, on the part of the plaintiff, it was not attempted to prove any specific contract or understanding in his particular case to vary that practice. Whether a presentment after banking hours is sufficient for the purpose of charging a party to the bill, is a very different question from that which is, whether such a presentment was proved, and bound the bank, in their character of agents to the plaintiff, to pay the bill. The verdict therefore must stand.

PARKE B.—I am of the same opinion, and should

been satisfied had the verdict been for the
The declaration in substance complains that
, the defendants, have neglected to pay a bill
ge, which in their usual course of dealing as
hey ought to have paid. But their contract
laintiff as his agents was to be at the bank,
y all his bills presented there between nine
if they were in funds. No breach of that con-
been proved, for they were clearly not bound
er the latter hour; and the question, whether
in funds at eleven o'clock, to which time it
t the presentment was continued (*a*), has been
in the negative. The plaintiff as principal
ve been at the bank to pay the bill at six
but the defendants, as his agents, were only
be there till five o'clock to pay. The other
oncurring,

Rule refused.

leyward v. *Bank of England*, Stra. 550; *Turner* v. *Mead*, *id.*
v. *Da Costa*, *id.* 910.

LORD TREASURER'S REMEMBRANCER'S OFFICE.

NG *against* The Mayor, Jurats, and Com-
ty of the Town and Port of DOVER, claiming
n Recognizances of 300*l.*, 150*l.*, and 150*l.*

Muirhead having been charged with a mis-
meanor before a justice of peace for the town
t of *Dover*, was admitted to bail on giving re-
nces, himself in 300*l.*, and two sureties in 150*l.*

By charter of *Edw.* 4. all *penalties forfeited*, and to be forfeited, of all and every the barons and

n the port of *Dover* &c., in whatsoever courts of his majesty they should
be adjudged, were granted to the mayor and corporation of *Dover*. By
of *Car.* 2. all fines, *forfeitures* &c., arising in the said courts, were granted
ne body: Held, that a recognizance entered into before a justice of peace of
and port of *Dover*, conditioned to appear and answer an indictment at the
there, which was forfeited by the non-appearance of the party, did not pass
ayor and corporation as a *forfeiture*.

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each, for his appearance at the next sessions of the peace for *Dover*, to answer the matters of an indictment to be there preferred against him. In consequence of *Muirhead*'s not appearing to take his trial, the recognizances were forfeited and estreated into this court. The right of the crown to these forfeitures having been specified in a constat (*a*), the corporation

(*a*) *Viz. More common matters of Michaelmas term, in the tenth year of the reign of King George the Fourth.*

Town and Port of *Dover* in the county of *Kent*.

An estreat of recognizances forfeited at a general sessions of the peace o[illegible] our lord the king, holden for the town and port of *Dover* aforesaid, and th[illegible] limits and precincts of the same, at the *Guildhall* of and in the said tow[illegible] and port, the 22d day of *September* in the tenth year of the reign of Ki[illegible] *George* the Fourth, before the worshipful *H. P. Bruyeres* esq. mayor, a[illegible] others, justices assigned.

Of *J. Muirhead* of *Dover* aforesaid gentleman, because he came not now here to answer an indictment against him for an attempt to commit sodomy, as by recognizance he undertook . . . . . [illegible]

Of *R. S. Court*, of *Dover* aforesaid, wine-merchant, one of the pledges of the said *J. Muirhead*, because he had him not here to answer as last aforesaid, as by recognizance he undertook . . . . . [illegible]

Of *W. S. Huntley*, of *Dover* aforesaid, innkeeper, one other of the pledges of the said *J. Muirhead*, because he had him not here to answer as last aforesaid, as by recognizance he undertook . . . . [illegible]

Total [illegible]

Examined by *T. Farrar*, clerk of the foreign estreats.

The claim of the mayor, jurats, and commonalty of the town and p[illegible] *Dover* (one of the cinque ports), and the limits and precincts of the [illegible] town and port, upon the account of *E. Rice* esq., late sheriff of the [illegible] of *Kent*, to wit, from the feast of *St. Michael the Archangel*, in the tent[illegible] year of King *George* the Fourth, until the same feast next following, in the [illegible] year of his present majesty King *William* the Fourth, that is to say, for [illegible] whole year. The said mayor &c. of the town and port of *Dover*, and [illegible] limits and precincts of the same, by *W. F.* their attorney, pray to be allowed 600*l.*, wherewith the said late sheriff is charged in his acco[illegible] aforesaid, before the foreign apposer of this Exchequer, in the roll of estre[illegible] under the title following; to wit,

of *Dover* claimed the produce of the forfeited recognizances against the crown in a manner resembling that

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Town and Port of *Dover*, in the county of *Kent*.

An estreat of recognizances forfeited at a general session of the peace, (here followed the estreat as before set forth,) and which said sums of 300*l.*, 150*l.*, and 150*l.*, amounting as aforesaid to the said sum of 600*l.*, the mayor &c. of the town and port of *Dover*, in the county of *Kent*, by their attorney aforesaid, claim to belong to them: for that the said *J. Muirhead*, under whose name the said sum of 300*l.*, in the aforesaid constat or schedule from the said roll of estreats is demanded; and the said *R. S. Court*, under whose name the said sum of 150*l.* is demanded in the aforesaid constat or schedule; and the said *W. S. Huntly*, under whose name the said sum of 150*l.* in the same constat or schedule is particularly demanded, were severally and respectively, at the time or respective times when the said recognizance was entered into, acknowledged and taken resiants within the said town and port of *Dover*, the limbs or precincts of the same: and which said sums of 300*l.*, 150*l.*, and 150*l.*, the said mayor &c. claim to belong to them, for that the said recognizance was entered into, taken, and acknowledged before a justice of the peace of and for the said town &c. of *Dover*: and which said sums of 300*l.*, 150*l.*, and 150*l.*, the said mayor &c. claim to belong to them, for that the said *J. M.*, *R. S. C.*, and *W. S. H.*, were severally and respectively, at the time when the said offence and misdemeanor was committed, in respect whereof the said recognizance was so entered into, taken, and acknowledged as aforesaid, resiants within the said town and port of *Dover*: and which said sums of 300*l.*, 150*l.*, and 150*l.*, the said mayor &c. claim to belong to them, for that the said offence and misdemeanor, in respect whereof the said recognizance was so entered into and acknowledged by the said *J. M.*, *R. S. C.*, and *W. S. H.*, was committed by the said *J. M.* within the town and port of *Dover*, the limbs or precincts of the same, and which said sums of 300*l.* 150*l.* and 150*l.* the said mayor &c. aforesaid claim to belong to them; for that the said *R. S. C.* and *W. S. H.* were severally and respectively resiant within the said town and port of *Dover*, the limbs or precincts of the same, at the time when the said recognizance became forfeited; and which said sums of 300*l.* 150*l.* and 150*l.* the said mayor &c. claim to belong to them; for that the said recognizances was forfeited at a general session of the peace of our lord the king, holden for the said town and port of *Dover*, and the limbs or precincts of the same, before the then mayor and justices assigned to keep the peace of the said town and port of *Dover*. And the said mayor &c. also claim to be entitled to all and all manner of fines, and sum or sums of money thereupon due, forfeited, or to be forfeited, amerciaments, issues and redemptions, penalties and forfeitures lost and forfeited, or to be lost

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set forth at length in *The King* v. *The Mayor &c. of the City of London* (a). The charter of 5 *Edw.* 4., bearing date at *Westminster* on the 23d *March*, in the fifth year of his reign, stated in their claim, contained the following clause:—

"That the mayor, jurats &c. and their successors, might for ever have all and all manner of fines for trespasses, offences and misprisions, extortions, negligences, ignorances, conspiracies, concealments, regratings, forestallings, maintenances, ambidextries, champerties, falsities, deceits, contempts and other offences whatsoever; and also fines for licence of concords, and all amerciaments, redemptions, issues, and penalties for-

or forfeited, assessed or adjudged within the town and port of *Dover*, and the limbs and precincts of the same for the time being, and to levy and receive the same by themselves and their ministers from time to time, and to convert the same to the use and behoof of the said mayor &c. and the limbs and precincts of the same, and their successors, without any estreats thereof to be sent or returned into the Exchequer of his present majesty, or his heirs or successors, and without any hindrance of his said majesty, his heirs or successors, or any other person or persons whomsoever; and the said mayor &c. in order to show their right to the said recognizances, penalties and forfeitures, fines and sums of money, and the other privileges hereby claimed, say, that the town and port of *Dover*, with its limbs and precincts, is an ancient and populous town and port, and that the inhabitants of the said town and port, and the limbs and precincts thereof (as being one of the ports of our lord the king, called the Cinque Ports), in times past have had, used, and enjoyed divers liberties, privileges, customs, franchises, immunities, and pre-eminences, as well by reason of divers charters and letters-patent, as by reason of divers prescriptions and customs used and exercised in the said town and port, and the limbs and precincts thereof, being part and member of the five ports, commonly called the Cinque Ports, in the counties of *Kent* and *Sussex*. And also for that *Edward the Fourth*, king of *England*, by his charter bearing date at *Westminster* the 25th day of *March*, in the fifth year of his reign, and transmitted by writ of mittimus under the great seal of *Great Britain* into this court, and inrolled on the Remembrancer's side, after reciting &c. This charter was set out at length; its material parts will be found in the text.

(a) *Ante*, Vol. IV. 709.

feited and to be forfeited, year, day, waste, strepe, and all things which to his said majesty or his heirs might appertain, of such year, day, waste, and strepe of all and every the barons and other the resiants aforesaid, their heirs and successors wheresoever, within the ports and members aforesaid as without, in whatsoever courts of his said majesty and his heirs the same barons and other resiants should happen to be adjudged to make such fines and to be amerced, and to forfeit such issues, penalties, year, day, waste, strepe and forfeitures; which fines, redemptions, amerciaments, issues, penalties, year, day, waste, strepe, and forfeitures might appertain to his said majesty and his heirs, if the same had not been granted to the aforesaid barons and good men and their successors, so that the said mayor and jurats, and bailiff and jurats, and also jurats in every port and member of the ports and members aforesaid, as is aforesaid chosen by themselves or their ministers, such fines, amerciaments, redemptions, issues, penalties and forfeitures, and all things which to his said majesty, his heirs and successors, might appertain, of the year, day, waste, strepe and forfeitures aforesaid, might levy, perceive, and have to the common profit and use of the said barons, their heirs and successors, without impediment from his said majesty, his heirs, his justices, or their bailiffs, or his ministers whatsoever." They then stated, that *Charles* 2. heretofore king of *England*, by his charter bearing date at *Westminster* the 23d day of *December*, in the twentieth year of his reign, and transmitted by writ of mittimus under the great seal of *Great Britain* into this court, and inrolled on their Remembrancer's side, after reciting &c. inter alia granted as follows: "That the mayor &c. and their successors, might have and perceive, and should have and perceive to their proper

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use and commodity respectively, all and singular fines, amerciaments, redemptions, issues, forfeitures, and other promises whatsoever, of and in the courts aforesaid respectively growing, arising, happening, or contingent; and all and singular those fines, forfeitures, redemptions, amerciaments, issues, forfeitures and profits, to their own use and commodity respectively, from time to time, by their ministers, to levy, perceive, seize, and retain, by action or actions of debt, or such other suits, actions, means, ways, and process in any court or courts of record within the cinque ports or ancient towns aforesaid, or members of the same aforesaid, or any of them, to be had and prosecuted, by which such fines &c. in any court of him his said majesty, his heirs and successors, through his whole kingdom of *England*, were wont to or might be levied, perceived, or recovered without impediment of him, his heirs or successors, or any of his ministers whatsoever."

The attorney-general, in his replication, set out the recognizances and the condition for *Muirhead*'s appearance; and then averred, that *Muirhead* did not appear in pursuance thereof, and that the recognizances thereupon remained and were in full force; that thereupon *Muirhead* and his sureties became and were indebted to the king in the sum of 300*l.* &c., making together the sum of 600*l.* which had been estreated and was owing to the crown by virtue of the recognizances.

General demurrer and joinder.

Jervis for the defendants. The question is, whether recognizances entered into before a justice of peace for the town and port of *Dover*, conditioned for the appearance of a party to answer an indictment for a misdemeanor to be preferred at the sessions there, and

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arguing *Reniger* v. *Fogossa* (*a*), in the Exchequer Chamber, said, it was held that the grant was good; and yet at the beginning the king knew not what issues or amerciaments would be afterwards forfeited; but because when they were forfeited they might be certainly known (and so there is a means to know the certainty of them) the grant was adjudged good. However, the grant of "forfeitures" will support the claim of the corporation. For that word means something more than the goods and chattels of felons, those having been already granted to the corporation by the charter *Edw. 4.* as "goods waived;" and *Cowell* in his *Interpreter* says "*Forfeiture*, forisfactura, cometh of the French word *forfaict*, id est, *scelus;* but in our language signifieth rather the effect of transgressing a penal law than the transgression itself, as forfeiture of escheats, 25 *Edw.* 3 c. 2. stat. de proditionibus. Now goods forfeited and goods confiscate differ, see *Staunford's Pleas of the Crown*, fol. 186., where those seem *forfeited* that have a known owner having committed any thing whereby he hath lost his goods; and those *confiscate* that are disavowed by an offender as not his own and claimed by any other; but we may rather say, that forfeiture is more general, and confiscation more particular, to such as forfeit only to the king's exchequer. Read the whole chapter, lib. 3. c. 24, Full forfeiture, plena forisfactura, otherwise called plena vita, is forfeiture of life and member, and all else that a man hath *Manwood*, cap. 9. The canonists use also this word Forisfacturæ sunt pecuniariæ pœnæ delinquentium. *Ducange* has the following passage under this title "*Forisfactura*, mulcta vel emenda ob forisfacturam seu delictum, amende des forfaitures; apud *Froissart*, vol. c. 116. Leges *Edwardi* Confessoris, c. 36. Inveniar plegios, tales qui possunt reddere forisfacturam; id est

(*a*) Plowden, 12 a; and see *Rex* v. *Wendman*, Cro. Jac. 82. Sees *Strait* and *Bagge's* case, K. B. 1 Leonard's R. 249.

were (a) suum nisi, possint disrationari. Forisfactura, eodem significatu, literæ *Philippi* Fr. Regis, anno 1290, inter anec. *Marten*, tom. i. col. 1234. Emendam vero, seu forisfacturam quam petebamus occasione homagii hactenus per eundem nobis non impensi—eidem (Comiti Hannoniæ) remisimus." *Carpentier*, in his supplement to *Ducange*, says, "*Forfaitura*, mulcta vel emenda ob forisfactum." Lit. *Ricardi* Regis Angl. tom. 5. *Ordinat. Reg. Franc.* p. 317. "Prohibemus ne aliquis eos inde disturbet super *forfaituram* decem librarum *Turon.*" *Johnson* explains the word forfeiture, as the "thing forfeited—a mulct—a fine." That the term "forfeited" is properly applied to, and includes forfeited recognizances, appears from the legislative exposition of 22 & 23 *Car.* 2. c. 22., and the preamble of 8 *Geo.* 4. c. 46. The act 22 & 23 *Car.* 2. is intituled "An act for the better and more certain recovery of fines and forfeitures due to his majesty." Though the preamble only mentions fines, issues, amerciaments and other forfeitures, without specifying recognizances, the act must intend to include them, for they are specifically mentioned in sections 5 and 9. So in section 10 they are included in the general word "forfeitures." Again, the court will construe these charters in favour of the grantees, the grants being expressed as made "of the king's special grace, certain knowledge, and mere motion." And there is no pretence for saying, that the king was deceived in his grant. The case of *Alton Woods* (b) thus explains the above terms. "This grant is made de gratiâ speciali (which implies bounty), and ex certâ scientiâ (which imports science and knowledge), and ex mero motu (which manifests that it was not made upon the sug-

(a) Capitis estimatio sive pretium quo vita cujusque apud Anglo Saxones pro vario statu, ordine, et conditione, censebatur.—*Lexic. Sax.*

(b) 1 Rep. 51. b.

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gestion or suit of the party); but all these are not of any effect or operation if the king be deceived."—Again: (a) "As to the rule put by *Starkey* that the king's patents shall be taken in such sense and to such intent as that they shall be good, and as to the said rule likewise taken that the king's patent ex certâ scientiâ et mero motu shall be taken as strong against the king as if a common person had made the grant, it was answered, that there is another rule in law, that when the king is deceived in his grant the grant is void, and that the king's letters-patent shall be construed "secundum intentionem domini regis, et non in deceptionem domini regis," as *Brian* saith, 1 *H.* 7. 13 a. So the last exposition is to make all these rules agree together, and therefore both the said rules put by the other party are true, with this limitation, viz. unless the king be deceived." In the Earl of *Rutland*'s case (b) the rule for construing the king's grants is thus stated: "His grant ought to be construed secundum intentionem regis, et non in deceptionem regis; and when a literal and strict construction is able to make his grant void, it sounds in deceit of the king, and is a great indignity to him, propter apices juris to make his charter, under the great seal, of things which he may lawfully grant, void and of none effect; quia apices juris non sunt jura."

Wightman contrà. The crown does not deny the correctness of the definitions of the word "forfeiture," or of the general positions of law set up by the defendants. But the fallacy consists in not adverting sufficiently to the terms of the instrument called a recognizance. Can it, though purposely set out in the replication, be improperly said to be a *forfeiture*, when its condition has not been complied with? It is sub-

(a) 1 Rep. 46, a. (b) 8 Rep. 56, b.

mitted that a recognizance is the acknowledgment of a debt due to the king, defeasible on the occurrence of a certain event, viz. the appearance of the party in court, pursuant to the condition. Thus, it resembles a bond; and the argument for the defendants will extend to this, that if a custom-house bond to the crown, defeasible in a certain event, *e. g.* a bond for exportation &c. is made within the cinque ports by a resiant therein, it would, when broken, pass to the corporation under these charters, as the recognizance creates an immediate debt or duty in the first instance. It is incorrect to say that it becomes *forfeited* (*a*), the true and accurate description being that its condition has not been performed. The defence to a recognizance, if put in suit, would be by plea that the party duly appeared according to the condition. If, as *Cowell* says, a forfeiture is the effect of transgressing a penal law, the court will hold that the crown used it in that sense, and not in order to grant away its property in defeasible instruments whose conditions had not been performed, and which are in nature of statutes staple(*b*). Doubtful expressions in grants by the crown are construed in favour of the king. Thus, in *Rex* v. *Sutton* (*c*), a grant of the goods of felons was held not to pass the goods of a felo de se; nor is there a forfeiture here arising in any court; for though by the non-appearance of the party there is no judgment on it, the recognizance becomes, as it were, absolute, till it is put in suit. Suppose the condition had been for paying the prosecutor so much money at the castle of *Dover*, the interest in such an instrument would, according to the

(*a*) As to this see *Rex* v. *Thompson*, *ante*, Vol. III. 53. Ex parte *Pellow*, Maclel. R. 111. *Rex* v. *Hawkins*, Maclell. & Y. 27.

(*b*) Com. Dig. tit. *Statute Staple*, (C.)

(*c*) 1 Saund. 269. S. C. 1 Sid. 420; 1 Ventris, 32; 2 Keb. 526. 533; 2 Rol. Abr. 194. C. pl. 2.

gument drawn from the use of the words "
recognizances," in the statutes *22 & 23 Car.*
Geo. 4. does not apply; for those are pœnæ d
tium, viz. forfeitures for offences, and not
zances, which create a debt or duty, viz. that t
shall do a certain act within the cinque p
cannot be forfeited, but may or may not be p
[*Parke* B. The defendants cannot claim u
words "penalties forfeited" in the charter of
for those are such as only the barons should
to be adjudged to make.]

Jervis replied.

Cur. adv

PARKE B. now delivered the judgment of t
—After stating the pleadings the learned b
ceeded:—The only question arising on these p
is, whether the recognizance, which was in
parlance forfeited by the non-appearance
Muirhead at the sessions, was comprised w
grant of the crown by the charter of *Edw.* 4. a
to the cinque ports of *Dover;* and we are of
that it was not.

Both the charters are stated to be of the
abundant special grace, certain knowledge, a
motion of the king;" but whatever the preci
of these words may be upon the construction

of which are to be found in *The Case of Mines* in *Plowden*, 337, in which case the word "mines" was held not to pass a royal mine; and in *Dyer*, 300, where the grant of the advowson was decided not to convey the present avoidance; and in the case of *The King* v. *Capper* (a) it was laid down that the words ex mero motu and certâ scientiâ do not reduce a royal grant to the same standard of construction as the grant of a subject, and bring it within the principle that it is to be taken strongly against the grantor. Upon referring to the charters in question, we cannot find any words apt and proper to convey the king's interest in recognizances of this kind, nor indeed any which induce us to think that they were intended to be granted; certainly none which, in the ordinary mode of construing royal grants, could have that effect.

These recognizances are nothing more than debts of record to the crown, with a defeazance in a particular event; and on the happening of that event, they become absolute debts. The words in the charter of *Edw.* 4. relied upon by the claimants as conveying such debts are "all amerciaments, issues, and penalties forfeited;" but the context clearly shows, that only such penalties are meant to be granted as are imposed by a judgment of some court; for the words are, "in whatsoever courts of his said majesty and his heirs the same barons and resiants should happen to be *adjudged* to make such fines, and to be amerced and forfeit such issues, penalties, &c.;" but there is no judgment of any court by which a recognizance is *adjudged* to be forfeited. Indeed little reliance was placed on this charter by the learned counsel for the claimants.

The other charter is that of *Charles the Second*, which is a charter of confirmation and grant of new privileges to the cinque ports. It establishes a court

(a) 5 Pri. 260.

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of record in each cinque port, and grants fines, amerciaments, redemptions, issues, *forfeitures*, and other profits whatsoever, of and in those courts, growing, arising, happening, or contingent. It then appoints corporate justices of the peace, and justices to hear and determine all felonies, &c.; and those delinquents, and every of them, for their crimes, by fines, ransoms, amerciaments, *forfeitures*, and otherwise, according to law, to chastise and punish. It then appoints corporate justices of gaol-delivery, and grants to each corporation all and all manner of fines, issues, redemptions, amerciaments, *forfeitures*, and profits whatsoever before the aforesaid justices (that is, the justices of the peace, oyer and terminer, and gaol-delivery), from time to time for ever thereafter to be assessed, forfeited, adjudged, growing, happening, or arising. It is contended that the recognizance in question is comprised under the term "forfeiture" in the latter charter; but the proper signification of that term, as appears from the citations in the argument from *Cowell's Interpreter*, and *Ducange*, is "a mulct or fine, a punishment for an offence;" and it is quite clear that it is used in that sense in the immediately preceding part of the charter, where the justices are empowered to punish delinquents by fines, ransoms, amerciament, and *forfeitures*. The term "forfeit" is indeed ordinarily applied to the penalty of a bond with a condition, or to an estate held on condition; but the penalty of the bond when it is forfeited, or the estate itself, is never termed a forfeiture, even in common parlance: and it is therefore impossible to suppose that a recognizance, with a condition broken, could be intended to be described by such a term in a legal instrument.

It is very true that in the stat. *22 & 23 Car. 2. c.* 22 the term "forfeiture" is used in the title of the act as a general term; and the act itself, after enumerati

fines, post fines, issues, amerciaments, forfeited recognizances, sum and sums of money paid and to be paid in lieu or satisfaction of them, speaks of *all other forfeitures;* but there the context clearly explains the meaning of the term "forfeitures." In the present case the context affords no such aid; and in its proper sense, especially in a grant from the crown, we are of opinion that it does not apply to a debt of record rendered indefeasible by non-compliance with the condition. Our judgment must therefore be for the Crown.

IN THE EXCHEQUER OF PLEAS.

DANIEL *against* PHILIPPS and DAVIES Esqrs.

Two magistrates convicted a party under 7 & 8 *Geo.* 4. c. 30. s. 24. for "unlawfully and maliciously damaging" a quantity of rushes, and adjudged him to pay 10*s.* as a *reasonable compensation*, and also 6*s.* 6*d.* for costs; the 10*s.* to be paid to an overseer of the poor of the parish, to be by him applied according to sect. 32 of the act (*D.T.* the owner of the rushes having been examined in proof of the offence); and the 6*s.* 6*d.* costs to be paid to *D. T.* The conviction proceeded to order, that in default of immediate payment the plaintiff was "to be imprisoned for one calendar month, unless the said sums should be sooner paid." The commitment stated the offence to be an unlawful trespass on land in the occupation of *D. T.*, and cutting down and carrying away a quantity of rushes, for which he had been ordered to pay 10*s.* "*penalty,*" and ordered the gaoler to detain him for "the space of one month, or until he should be delivered by the due order of law." Held, that the commitment was sufficiently sustained by the conviction to be within the protection of 7 & 8 *Geo.* 4. c. 30. s. 39.

TRESPASS. First count, for assaulting the plaintiff, compelling him to go along streets &c., and imprisoning him in the house of correction for the county of *Carmarthen*, and detaining him there for three days, and for causing him to be kept to hard labour during such imprisonment. Second count, for the same imprisonment for three days. Plea: not guilty (*a*). At the trial before *Gurney* B. at the last spring assizes for *Carmarthenshire*, it appeared that an

(*a*) See 3 & 4 *Will.* 4. c. 42. s. 1. *Ante*, Vol. IV. 670.

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act had passed in 1830 for inclosing all the common and waste lands in the parishes of *Kidwelly*, *St. Ishmael*, and *Pembrey*, in that county, including a marsh called *Ferry Marsh*, in that county. The plaintiff having cut rushes on that marsh on 28th *December* 1832, was convicted by the defendants, as justices of the peace for the county, on 7 & 8 *Geo.* 4. c. 30. s. 24., which enacts, "that if any person shall wilfully or maliciously commit any damage, injury, or spoil, to or upon any real or personal property whatsoever, either of a public or private nature, for which no remedy or punishment is thereinbefore provided, every such person, being convicted thereof before a justice of the peace, shall forfeit and pay such sum of money as shall appear to the justice to be a reasonable compensation for the damage, injury, or spoil so committed, not exceeding the sum of 5*l.*; which sum of money shall, in the case of private property, be paid to the party aggrieved, except where such party shall have been examined in proof of the offence: and in that case, and in the case of property of a public nature, or wherein any public right is concerned, the money shall be applied in such manner as every penalty imposed by a justice of the peace under this act is hereinafter directed to be applied: and such sum of money, together with costs (if ordered shall not be paid either immediately after the co viction, or within such period as the justice shall at t time of conviction appoint, the justice may commit offender to the common gaol or house of correct there to be imprisoned only, or to be imprisoned kept to hard labour, as the justice shall think fit any term not exceeding two calendar months, u such sum and costs be sooner paid: Provided al that nothing herein contained shall extend to any where the party trespassing acted under a fai reasonable supposition that he had a right to

act complained of, nor to any trespass, not being wilful and malicious, committed in hunting, fishing, or in the pursuit of game, but that every such trespass shall be punishable in the same manner as before the passing of this act." The defendants relied on a conviction in the following form:—

"Be it remembered, that on the 19th day of *January*, in the year of our Lord 1833, at *Carmarthen* in the said county, *Daniel Daniel* is convicted before us *John George Philipps* and *David Davies* esqs., two of his majesty's justices of the peace for the said county of *Carmarthen*, for that he the said *D. Daniel*, on the 31st *December* 1832, at the parish of *St. Ishmael*, in the county of *Carmarthen* aforesaid, a certain quantity of rushes, to wit, three cart-loads of rushes of *David Thomas*, then and there being, unlawfully and maliciously did damage and injure, cut and carry, against the form of the statute in that case made and provided; We the said *J. G. Philipps* and *D. Davies*, the justices of the peace aforesaid, do therefore adjudge the said *D. Daniel*, for his said offence, to forfeit and pay the sum of 10*s.* as a reasonable compensation for the damage and injury so committed by the said *D. Daniel* as aforesaid, and also to pay the sum of 6*s.* 6*d.* for costs: and in default of immediate payment of the said sums, to be imprisoned in the house of correction of the said county, and there kept to hard labour for the space of one calendar month, unless the said sums shall be sooner paid: And we the said justices do direct that the said sum of 10*s.* shall be paid to *W. Andrews* of the said parish of *I.*, being one of the overseers of the poor of the said parish in which the said offence was committed, to be applied by him according to the directions of the statute in that case made and provided (*D. Thomas*, the owner of the said rushes, having

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been examined in proof of the offence aforesaid, we order that the said sum of 6*s.* 6*d.* for costs s paid to the said *D. Thomas.* Given, &c."

The warrant of commitment was in the fo form:—

"These are to command you the said constabl each of you, in his majesty's name, forthwith to and deliver into the custody of the said keeper said house of correction the body of *D. Daniel*, parish of *St. Ishmael* in the said county, charged us with having, on the 31st of *December* now la *unlawfully trespassed* upon lands, the property Rev. *E. Picton*, clerk, in the occupation of *D.* of &c., and with having cut down and carried quantity of rushes, of which offence the said *D.* *is convicted before us*, and ordered to pay the 10*s.* *penalty*, and also the sum of 6*s.* 6*d.* costs att the prosecution of the said complaint, which th *D. Daniel* doth refuse to pay; and you the said are hereby required to receive the said *D. Dan* your custody in the said house of correction, a there safely keep *for the space of one calendar* *or until he be thence delivered by due order* Given &c."

Under this commitment the plaintiff was carr prison on 19th *January* 1833, where he remain the 21st. He was then discharged, upon the pa of the 10*s.* and costs. The plaintiff relied up variance between the conviction and the commi but the learned judge thought it cured by sect. 7 & 8 *Geo.* 4. c. 30. which enacts, that no warr commitment shall be held void by reason of any therein, provided it be therein alleged that the has been convicted, and there be a good and val viction to sustain the same; and after the plaint refused to be nonsuited, directed the jury to find

defendants a verdict accordingly. In *Easter* term last *E. V. Williams*, for the plaintiff, obtained a rule to show cause why the verdict should not be set aside and a new trial had.

Chilton and *J. Evans* showed cause in last term. The plaintiff contends that though the conviction may be good, the warrant of commitment is bad, and is not supported by it, for that the conviction described an offence different from that which is attempted to be technically described in the commitment. The commitment, however, is sustained by the conviction which was proved, for it substantially describes the offence for which the plaintiff was convicted; and were it otherwise, the variance is cured by 7 & 8 *Geo.* 4. c. 30. s. 39., which was expressly framed to protect magistrates from actions against them founded on errors merely technical. For this commitment alleges that the party has been convicted; and there is a good and valid conviction to sustain it. Then if the commitment must still strictly pursue the conviction, that clause would be nugatory, for there would be no defects to be cured by it. [Lord *Lyndhurst* C. B. Whether the offence mentioned in the conviction and that mentioned in the commitment were different or the same, was a question of fact.] That question was never left to the jury; and had the offences been distinct, the plaintiff should have shown them to be so by evidence, which should have been left to the jury; but in the absence of such evidence the commitment must be presumed to have proceeded on the conviction, both being grounded on one and the same offence. The next objection to the commitment is, that the offender is alleged to have been ordered to pay the sum of 10*s.* *penalty*, whereas the conviction awarded the sum of 10*s.* as a reasonable compensation, pursuant to the terms of the statute.

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But the merely calling this sum a penalty will not alter the nature of the payment, nor can it be doubted that it refers to the sum which in the conviction is styled a reasonable compensation. The payment, in fact, more resembled a penalty than a compensation, for it was given to the poor of the parish. Lastly, it was objected that the commitment varies from the conviction in the statement of the judgment, the conviction being that the offender, in default of payment, shall be imprisoned in the house of correction for one calendar month, unless the said sums shall be sooner paid; while the latter directs the gaoler to keep him in custody for the space of one calendar month, or until he shall be discharged by the due order of law. In fact, the offender was discharged according to the provisions of the statute upon payment of the 10*s*. Nor does the commitment vary in substance from them, for had it only stated the conviction, and then simply directed the gaoler to keep the plaintiff in custody, until discharged by due course of law, it would have contained no variance from the conviction. The addition of time does not alter it, for the act itself directs, that under particular circumstances the offender may be detained for the space of one month; now the commitment does not direct him to be imprisoned for one month, at all events, but "for one calendar month, *or until* he be thence delivered by the due order of law:" that being, that on payment of the money, he shall be delivered before the expiration of the month. The legal condition is therefore impliedly contained in the commitment. However, supposing it to be a variance, it is cured by 7 & 8 *Geo*. 4. c. 30. s. 39.

E. V. Williams and *James* in support of the rule.—The question is important, for, as the clause relied on by the defendants as curing the defect in the commitment occurs not only in the act before the court but

in the 9 *Geo.* 4. c. 31., (Lord *Lansdowne's* Act,) and in the 9 *Geo.* 4. c. 69., (the Game Act,) it is very material that its operation should be distinctly understood. First, what are the defects in the commitment? The criminal law knows no such offence as that there described, for the act does not confer on a justice the power of convicting a man for "unlawfully trespassing" upon lands, the property of another, but only gives him jurisdiction where a person "*wilfully or maliciously* commits any damage, injury, or spoil, to or upon any real or personal property. The commitment merely states a civil trespass to real property, the cutting and carrying away of the rushes being the aggravation of that trespass. But the offence described in the conviction entirely differs, not only in the nature of the offence, which is laid as a *malicious* damage, but in that of the property injured, which is described as personal property only, viz. three cart loads of rushes, without any reference to an injury to real property. Now the statute, by mentioning both real and personal property, must be understood to recognize the distinction between the two kinds of property, and as requiring it to be alleged to which in particular the damage was done. The offence described in the conviction belongs to one of the two distinct classes of offences described in the statutes, the commitment to the other. Now, unless 7 & 8 *Geo.* 4. c. 30. s. 39., cures the variance, it must be fatal; for in *Rogers* v. *Jones* (*a*) the Court said, "the commitment and the conviction do not connect themselves together. A magistrate cannot justify a commitment for one offence by a conviction for another and a different offence." The variance alluded to in that instance was less material than in this case. [*Gurney* B. There the conviction proceeded

(*a*) 3 B. & C. 409; 5 D. & R. 268, S. C.

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upon one statute, and the commitment upon another. *Goff's* case (a) was stronger than the present. And *Wickes* v. *Clutterbuck* (b) it said by *Parke* J. that the magistrate is to get rid of a bad commitment by referring to a previous conviction. In this, perhaps, I might have succeeded if he had shown that the commitment pursued the conviction, and that the conviction was good, which for the present purpose I will assume to have been the case. But the commitment is on ground totally different from that charged in the conviction, and how am I to know that there were not two informations against the party? Besides, the commitment does not state any ingredient of the offence described in the act, nor any offence within the summary jurisdiction of the magistrate, and it is not enough for us merely to believe that it refers to the conviction in a matter which ought to be considered so strictly. All this thing here shows that the conviction and commitment were not in reality for two different offences. *Lord Lyndhurst* C. B. That was a question of fact, if it should have been put to the jury, if meant to have been insisted upon. But it never was pretended that there was more than one conviction. The commitment refers to a conviction, and it must be presumed that the reference was the one in question. *Alderson* B. The objection would apply to every case of a variance. The act is intended to cure technical errors and mistakes, not substantial variances in their nature. The next objection is, that while the conviction is a reasonable compensation, the commitment is for penalty. The act intended to give the magistrate a discretion as to the sum to be paid by the offender, not a penalty for the act he had committed, but as a reasonable compensation to the party aggrieved by it. Because

(a) 3 M. & S. 203. (b) 2 Bing. 483.

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Now as no such discretion is required to the inflicting a penalty, the two payments are quite distinct in their nature; and the conviction and commitment contain different judgments imposing different payments. [Lord *Lyndhurst* C. B. We must consider the conviction to have been drawn up at the time, and the commitment to have been afterwards framed and intended to pursue it in terms. The commitment refers to the conviction. The form of the conviction given by the statute (*a*) uses the word "penalty," thus, ["or I adjudge the said A. O. for his said offence to forfeit and pay (*here state the penalty actually imposed, or state the penalty, and also the amount of the injury done, as the case may be*)."] The expressions are used indiscriminately. [*Alderson* B. Sect. 24. directs that where, as in this case, the party aggrieved is examined in proof of the offence, the money, which appears to the justice to be a reasonable compensation for the damage, &c. so committed, shall be applied in such manner as every *penalty* imposed by a justice under this act is hereinafter (s. 32) directed to be applied, *viz.* by paying it to some parish officer for the use of the county-rate. The form of conviction given by the act calls it a *penalty* generally, though (s. 24 calls it *compensation*, when paid to the party grieved.] In order to make the commitment good, it should appear on the face of it that the magistrates have exercised their discretion. [*Parke* B. That must be presumed.] Lastly, the commitment is for a month certain, while the conviction is for a month, *unless in the meantime the money be paid.* Now, though the jailer released the offender before the expiration of the month, it was at his own peril, for the only legal mode of getting rid of such an imprisonment would have been by habeas corpus. The commitment resembles pro-

(a) 7 & 8 *Geo.* 4. c. 30. s. 37.

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cess of execution; now if an execution does not p
the judgment it furnishes no justification. As
effect of 7 & 8 *Geo.* 4. c. 30. s. 39. in curing a
variances, it was not the object of the legislat
enable the justices, after having unlawfully impri
a man under a commitment clearly illegal, to avo
consequence of having so acted, by afterwards di
up a legal conviction for some offence totally di
in its nature from that for which the imprisonmen
place, so as to deprive him of all civil remedy f
grievance. Suppose a man to be thus commit
hard labour for an offence to which the law do
attach that punishment, could the justice defeat
tion against him by putting a false conviction
files of the quarter sessions? [*Lord Lyndhurst C.*
must be taken that the conviction was previously
In contemplation of law it necessarily precedes the
mitment. (a)] The words of the 39th section, t
very extensive, do not merely require that there s
be a good and valid conviction for some o
against the same offender, but also that it shoul
tain the commitment. Now in this case the comm
differs from the conviction in the nature of the o
the nature of the penalty imposed, and the conseq
of not paying the penalty, and only agrees with
being directed against the same person. Be
clause was only intended to cure technical error
material to the substance of the instrument.

Cur. adv. v

In this term

PARKE, B. delivered the judgment of the
This was an action of trespass and false impriso

(a) See *Massey* v. *Johnson*, 12 East, 67; *Gray* v. *Cookson and Cl*
East, 13; *Rex* v. *Barker*, 1 East, 182; *Still* v. *Wells*, 7 East, 553

against the defendants, two justices of the peace for the county of *Carmarthen*. There was a plea of the general issue. On the trial, before my brother *Gurney*, at the last spring assizes, a verdict was found for the defendants, by direction of the learned judge, the plaintiff not choosing to be nonsuited.

A rule nisi having been obtained to set aside this verdict, cause was shown, and the case fully argued before my Lord *Lyndhurst*, and my brothers *Alderson* and *Gurney* and myself, in the last term.

The facts of the case were these. The plaintiff was convicted before the defendants, on the 19th *January* 1833, under the 7 & 8 *Geo.* 4. c. 30. s. 24., and ordered to pay the sum of 10*s.* and costs; and on the refusal by him to do so, he was committed to prison by a warrant of commitment, directed to the constables of the parish of *St. Ishmael* and keeper of the house of correction at *Carmarthen*, under the hands and seals of the two defendants, the material part of which is as follows:—"These are to command you the said constables forthwith to convey and deliver into the custody of the said keeper of the said house of correction, the body of *D. Daniel*, &c. charged before us with having on the 31st *December* now last past, unlawfully trespassed upon lands, the property of the Rev. *E. Picton*, in the occupation of *David Thomas*, at *Rollen Hill*, &c. and with having cut down and carried away a quantity of rushes therefrom, of which offence the said *D. Daniel* is convicted before us, and ordered to pay the sum of 10*s.* *penalty*, and also the sum of 6*s.* 6*d.* costs, &c. which the said *Daniel* doth refuse to pay; and you the said keeper are hereby required to receive the said *D. Daniel* into your custody in the said house of correction, and him there safely to keep for the space of one calendar month, or *until he be thence delivered by the due order of law.*"

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A conviction was produced on the trial, of which the following is a copy:—[The learned baron here read the conviction.]

Several objections were taken to the commitment. First, That no offence was stated in the recital of the convictions, because in order to constitute an offence within the 24th sect. of 7 & 8 Geo. 4. c. 30, the damage must be wilfully or maliciously committed, and there is no statement that the trespass, though unlawful, was wilful or malicious.

Secondly, It was objected, that the conviction did not support the commitment, for the former was for an injury to personal, the latter to real property.

A third objection was, That the commitment was for the non-payment of a *penalty*, while the adjudication of imprisonment in the conviction was for the non-payment of a sum of money, by way of *compensation* for the damage.

And the fourth and last, That the commitment was void, because it was for a month, or until he should be delivered by the due order of law, and the act authorized a commitment for any time not exceeding two calendar months, not absolutely, but unless the sum ordered to be paid and costs should be sooner paid.

In answer to these objections, the defendants counsel relied on the 39th section of the same statute, the 7 & 8 *Will.* 4. c. 30, by which it is enacted, inter alia, "that no such conviction shall be quashed for want of form, or be removed by certiorari &c., and no warrant of commitment shall be held void by reason of any defect therein, provided it be therein alleged that the party has been convicted, and there be a good and valid conviction *to sustain the same*."

The first of the objections is certainly cured by this clause in the statute; and the second ought not to prevail, because it is clear that the conviction is for

the same offence, though in somewhat different language, viz. for the maliciously cutting and carrying away a quantity of rushes: and it proceeds upon the same statute as that on which the commitment is founded, in which respect this case is distinguishable from that of *Regina* v. *Jones* (a), cited at the bar, where the commitment and conviction were for offences against different statutes.

As little foundation is there for the third objection, viz. that the commitment is for non-payment of a *penalty*. The 24th section treats as a *penalty* the sum awarded by the justice, where the party aggrieved is examined in proof of the offence, (and that was so in the present case) for it directs the money to be applied as by any penalty imposed by a justice of the peace under that act is thereinafter directed to be applied.

The objections are therefore reduced to the fourth and last, which is, that the commitment is for a month absolutely, whereas the statute authorizes a commitment for that time, unless the sum ordered to be paid, and costs, be sooner paid.

It is clearly settled that the cause of commitment ought to be certainly stated, so that the end that the party may know for what he suffers, and how he may regain his liberty, *Dr. Greenwalt's* case (b); and if it be not, it is not only a ground for discharging the party, but the warrant is void in an action of false imprisonment, *Groome* v. *Forrester* (c), contrary to the dictum of Lord *Holt* in *Brady's* case (d). In the present case, the conclusion of the warrant of commitment is clearly wrong, unless the words, "until he be deli-

(a) 3 B. & Cr. 409; Ry. & M. 129, S. C. See In the Matter of *Elmy* and *Sawyer*, 1 Adol. & Ell. 852.
(b) Ld. Raymond, 213.
(c) 5 B. & Ald. 314.
(d) Comberb. 391.

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vered by the due order of the law," are equivalent to th qualification which the statute requires, and whic ought to have been introduced, viz. unless the mone should be sooner paid. But that they are not equiva lent, appears by *Dr. Groenvelt's* case, and also by th *Mayor and Churchwardens of Northampton's* case (a) and *Yexley's* case (b). *Goff's* case (c) is no authority t the contrary; for there was no uncertainty on the fac of the commitment; the adjudication was recited an was correct, and the Court construed the conclusion c the warrant with reference to the recital in the warran itself.

There is no doubt therefore in our minds but th the conclusion of this warrant of commitment is wron and the commitment void, unless it be aided by the 30t section above referred to. It is contended by th plaintiff that it is not, because that section has n operation, unless two conditions are complied with first, that it is alleged in the warrant that the party i convicted; and secondly, that there be a good an valid conviction to sustain the warrant of commitment and, although it is admitted that the first condition i performed, it is insisted that the second is not. An the case appears to us to resolve itself into the que tion, whether the conviction in this case, which is ce tainly good and valid on the face of it, does susta the warrant of commitment, within the meaning of th act. On the part of the plaintiff it is contended that does not, because it is insisted that it is necessary th the conviction, in order to sustain the commitmen should authorize that imprisonment which it directs and this conviction does not. Though it may not b necessary that they should agree in every particula

(a) Carthew, 152. (b) 3 Salk. 551. (c) 3 M. & S. 223.

it is contended that an agreement in this respect is essential: otherwise a commitment might be for ten years, and a conviction adjudging an imprisonment for a month, might render the commitment valid for a month. On the other hand, it was agreed for the defendants, that all that this clause in the statute requires is, that there should really be a conviction on the face of it good and valid, and authorizing the imprisonment complained of, and that the warrant should be issued on that conviction; at all events, that the commitment may be *explained* by the terms of the conviction.

We have felt considerable doubt, in the course of the argument and on subsequent consideration upon this question; but we have come to the conclusion that the effect of the 30th section is to render this conviction valid. It is perfectly clear that the legislature meant to cure *some* defects in the warrant by this clause; it is equally clear that, in order to ascertain whether any defects in the warrant are cured, reference must be had to the conviction itself, for the purpose of ascertaining that it is good and valid. Hence it follows, that neither the party to be affected by the warrant, nor those who are to act upon it, can know from the warrant alone (if there be *any* defect on the face of it) whether it is valid or not. There *must* be a reference had to the conviction: and, in this respect, the clause in question alters the general law, by which the offence and punishment are to be collected from the warrant itself. We cannot help thinking that the reason why the legislature has made it essential to the cure of any defect in the commitment, that it should state that the party was convicted, is to give those who are to act upon or be affected by the warrant, notice, that there is a conviction, and put them upon inquiry after the terms of it.

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If there is to be a reference to the conviction (as there must be) why are we to narrow the beneficial effect of the clause in question, by holding that the reference must be for one purpose and not for all?

Our opinion is, that as both instruments must be looked at by all parties concerned in the validity of the warrant, wherever there is *any* defect in it, *both* are to be read together, and to be held explanatory one of the other: and that, upon thus reading them, the conviction justifies the commitment so explained, it is sufficient. Taking the two together in this case, the conviction explains the ambiguous words at the end of the commitment, and they may, on the principle of the decision in *Goff's* case, above referred to, be construed, by aid of the conviction, to mean that the plaintiff is to be imprisoned for a month, unless the money be in the meantime paid.

It is unnecessary for us to decide, whether the imprisonment would have been justified, if the conclusion of the warrant had not contained ambiguous words capable of explanation by the context, and had been plainly wrong; as if the commitment had been for two months, and the adjudication for one, unless the money should have been first paid: though looking at the very large words of the 39th section, even such a defect may have been intended to be cured.

We therefore think that the 39th section does cure the defect in this case, as the warrant does refer to a conviction, and there is a good and valid conviction on which the warrant was founded, and which does, when both are read together, *sustain* the warrant even in the sense attributed to that word by the plaintiff's counsel, that is, it authorizes the imprisonment mentioned in the warrant. We feel satisfied that by giving this construction to this clause, we are acting in accordance with the

The rule must therefore be discharged.

CARR and Others, Assignees of CLAPHAM, a Bankrupt, *against* BURDISS and Another.

At the trial of an action by assignees of a bankrupt to recover goods and chattels from parties claiming under a prior assignment by the bankrupt, the plaintiffs produced the latter deed in pursuance of notice to that effect from the defendants. Held, that the plaintiffs might read it in evidence, without proving its execution, though they sought to impugn its validity for fraud.

To a declaration in trover by the assignees of a bankrupt to recover damages for goods, chattels, and fixtures, alleged to be in the possession of the bankrupt at the time of his bankruptcy, and to have been since converted by the defendants, they pleaded that before the bankruptcy the bankrupt assigned the goods to them by deed, who before the bankruptcy took possession of them, and kept and retained such possession afterwards. The plaintiffs replied, that the defendants did not take possession of the

TROVER for goods, chattels and fixtures. The first count stated the goods to be the bankrupt's property at the time of his bankruptcy, with a conversion by the defendants after his bankruptcy. Second, said the property in his assignees. Pleas; first, that *A. Clapham* did not become bankrupt; two, pleas upon which nothing turned. Fourthly, (to the whole declaration) that by a deed of assignment dated 8th *July* 1833, *A. Clapham* assigned the goods to the defendants; and that before the bankruptcy they took possession of the said goods and chattels so conveyed and assigned to them, and by virtue thereof thence continually kept and retained possession thereof. Replica-

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tion, that the defendants did not take possession of the goods before the bankruptcy. The trial took place before *Gurney* B., at the last *Lancashire* assizes. Without repeating the facts before reported, *ante*, p. 136. it will be sufficient to state the following. The plaintiffs had given the defendants notice to produce the deed of assignment to them by the bankrupt. It was produced at the trial, and, after objection made, the learned baron decided that it should be read on behalf of the plaintiffs, without putting them to prove its execution by the attesting witness. It also appeared that on 8th *January* 1834, before the defendants had taken possession under the assignment to them, *Dalgleish*, a creditor of *Clapham*, applied to him for payment of a debt. *Clapham* paid him a country bank note on account, saying, that if his assignees did not approve of it, *Dalgleish* must return it. The jury found that this payment was made without pressure, and with intent to prefer *Dalgleish* to the other creditors. The learned baron held, that that payment was not an act of bankruptcy, in which the court afterwards concurred, and a verdict was found for the plaintiffs for 1[illegible]889*l.* 12*s.* 3*d.*, the value of the goods and chattels, exclusive of the fixtures (*a*).

Creswell, in *Michaelmas* term last, moved for a rule to show cause why there should not be a new trial, or why the judgment should not be entered for the defendants non obstante veredicto, or why the judgment should not be arrested. First, the deed of assignment was not evidence, without regular proof of its execution by the attesting witness; for though the defendants produced the deed and claimed an interest under it, it is not, therefore, as in the ordinary case, admissible, for the plaintiffs disputed its validity. The decisions on this

(*a*) As to the latter, see *ante*, 139.

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stood the rule to be, that a party claiming an interest under a deed, and producing it on notice to do so, affirms its due execution. Here the defendants, who took the goods under the assignment, have admitted its execution. [Had it been produced by the plaintiffs at the trial, in consequence of having been previously handed over to them by the plaintiffs, it might have been different, *Kacher* v. *Cocks* (a). Both parties here admit the fact of execution.] But the plaintiffs, without claiming any benefit under the deed, sought for its production in order to invalidate it, on account of fraud in the circumstances under which it was executed. As it has been held that this assignment was not an act of bankruptcy, it operated to pass the property in the goods to the defendants. For the plea that they took possession of the goods before the bankruptcy, was not disproved by the payment to *Dalgleish* on the 8th *January*, which was contended by the plaintiffs to be an act of bankruptcy on that day; for though that payment was found to be voluntary, it did not constitute an act of bankruptcy within 6 *Geo.* 4. c. 16. s. 3. That section enacts, that if any trader shall make, or cause to be made, any *fraudulent* grant or conveyance of any of his lands, tenements, goods or chattels, he shall be deemed to have committed an act of bankruptcy. That section, by omitting in the latter part the word "money," which had been before inserted, shows the intention of the legislature that payment of money to a creditor should not be an act of bankruptcy. [*Parke* B. The fraudulent delivery of a bill of exchange has been held within this section, *Cumming* v. *Bailey* (b).] That was a "chattel" within the act, which money is not. *Bevan* v. *Nunn* (c)

(a) 1 B. & Adol. 145. (b) 6 Bing. 363.
(c) 9 Bing. 112; see s. 82 of 6 Geo. 4. c. 16.

seems an authority that the payment of a debt to a creditor by way of preference is not an act of bankruptcy, though the fraudulent grant or conveyance of goods or chattels is. Thirdly, judgment must be entered for the defendants on the fourth plea, for the plaintiffs have taken an immaterial issue, which leaves a good defence to the action on the plea; for if the bankrupt's assignment to the defendants was good, it passed the property, and it was immaterial whether they took possession or not.

Lastly, the judgment must be arrested, for the plaintiffs could not be entitled to it on an immaterial issue. Supposing it material, the verdict was against the evidence. A rule having been granted on every point except the first,

F. Pollock, Blackburne and *Wightman* showed cause. First, the payment to *Dalgleish* was a *fraudulent* preference, and therefore an act of bankruptcy. *Bevan* v. *Waters* established that a transfer of goods in satisfaction of a debt, which is made voluntarily and in contemplation of bankruptcy, is an act of bankruptcy under sect. 3 of 6 *Geo.* 4. c. 16., and though not occurring more than two months before a commission issues, is not protected by section 81. There is no difference in principle between that case and the present; but the delivery to *Dalgleish* of a country note, payable on demand, assimilates this case to that of a bill of exchange in *Cumming* v. *Bailey*, where *Tindal* C. J. said, "Indeed it would be a very narrow construction of the act to hold that a banker, whose most valuable property often consists of bills and notes, could not commit an act of bankruptcy by a fraudulent transfer of them;" and *A. Park* J. added, "under all the bankrupt statutes goods and chattels have been held to include

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bills of exchange; and seeing that a large portion the property of bankrupts must consist of such instr ments, it would be absurd to hold the contrary. Th learned judge cited *Hornblower* v. *Proud* (a) as e pressly in point.] A note is not money, but a chatt But trover would lie for money, if identified. Then in trover the assignees could have recovered the mon handed over, the fraudulent parting with it constitut an act of bankruptcy. Secondly, the issue taken the plaintiff on the fourth plea is material, for the p session, as averred in the plea, was so. The declarati in one count alleged the possession to have been the bankrupt, while the defendants in their plea aver that they were in possession. That was a direct t verse; for supposing the bankrupt to have been possession as reputed owner, that seems inconsiste with the plea, that the defendants were in possessi before the bankruptcy. [*Parke* B. May not he have been in possession, the bankrupt having all indicia of ownership about him, and the defenda not? Is the averment that the plaintiffs were in p session necessarily inconsistent with the possessio the bankrupt? His apparent ownership of the h &c. by residing there, may have been also the p sion of the defendants as between them and That would be the possession of the bankrupt. defendants must show that he had that possessi that the plaintiffs had it not. [*Parke* B. That the word possession means "exclusive" pos It is in that sense only that it is used in the pl The plea, by not traversing the possession o signees after the bankruptcy, amounts to t that long before the bankruptcy an assign made to the defendants. [*Parke* B. The p

(a) 2 B. & Ald. 327.

have been bad on demurrer, as amounting to the general issue, and not directly denying the plaintiff's property. But is it not good now?] It is equally bad since the verdict, if it does not exclude the plaintiff's right of action. To do that, it was necessary to aver the material fact of possession by the defendants, as well as the conveyance to them. Had an assignment been made to the defendants before the bankruptcy, still if possession was not taken under it, they would be entitled to recover. [*Parke* B. If it was absolutely conveyed out of the bankrupt, it must be taken to vest in the defendants till the contrary is shown, as the plea is not demurred to. Suppose possession by the bankrupt not to have been found, the assignees have no claim, unless the goods were in the possession, order and disposition of the bankrupt; and it is not inconsistent with that plea that the property should be in the defendants, and the possession in the bankrupt.] Unless possession can be concurrent in two persons, each having a power of disposition, the issue was material. The utmost that can be granted is a repleader, if the issue is immaterial.

Cresswell, *Ingham* and *W. H. Watson* supported the rule. No averment that the defendants were possessed of the goods was requisite. By section 72 assignees take what has been in the bankrupt's possession as reputed owner. They must establish their property in the goods, and their right to the possession of them. In this instance the bankrupt had disposed of them by deed, so as to vest the property in the defendants long before the bankruptcy. Their taking possession is immaterial, as the property was shown to be vested in them, and nothing appears in the way of reconveyance by which it was revested in the bankrupt. This remaining in possession after assigning to the defendants

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is not inconsistent with their interest; *Kingsbury* v. *Collins* and *Elmes* (a).

(The court here stopped the argument.)

PARKE B.—I much doubt whether the proper meaning of the term "possession," as used in the plea, is, that the defendants took such a possession of the articles claimed, as excluded the case of a reputed ownership of the bankrupt. At all events I am of opinion, on the authorities collected in *Martindale* v. *Booth* (b), that a transfer of personalty is sufficiently perfected by a deed of assignment, without possession, and that a continued possession by the assignor is only evidence of fraud. The issue therefore was an immaterial one. There must either be a repleader or judgment for the defendants non obstante veredicto.

A new trial was granted ultimately without costs, with leave to the plaintiffs to amend on payment of costs (c).

(a) 4 Bing. 133.

(b) 3 B. & Ad. 884; and see *Smith* v. *Topping*, 5 B. & Ad. 674.

(c) See *Leslie and Others, Assignees*, v. *Guthrie*, 1 Bing. N. C. 697.

FLETCHER *against* GREENWELL.

By a local act the directors and guardians of the poor of a parish were to sue and be sued in the name of their clerk. In an action of assumpsit against him for work done by their order, Held that a person, who was a director at the time the cause of action arose, is a good witness for the defendant, and that no notice of action was requisite under the local act.

ASSUMPSIT. The declaration was against the defendant, vestry-clerk of *Mary-le-bone* in the county of *Middlesex*, according to the form and effect of an act of parliament made and passed in the 35th

Geo. 3. intituled, "An act for repealing several acts made in the 8th, 10th, 13th and 15th years of the reign of his present majesty, for regulating the nightly watch and beadles, and for paving, repairing, cleansing and lighting the parish of *St. Mary-le-bone*, in the county of *Middlesex*, and for the better relief and maintenance of the poor thereof, and for divers other purposes therein mentioned, and for making more effectual provisions for those purposes," who has been summoned to answer the said plaintiff in an action on promises, for that whereas the directors and guardians of the poor of the said parish, for carrying into execution the several powers given and intrusted to them by the said act, were indebted to the plaintiff in the sum of 50*l.* for work done by the plaintiff, and with his mills and machinery, for the said directors and guardians, which they promised to pay; and a count on an account stated. Pleas: first, non assumpsit; secondly, payment.

The cause was tried before the under-sheriff of *Middlesex*, under a writ of trial issued in pursuance of a judge's order (3 & 4 *Will.* 4. c. 42. s. 17.) The plaintiff went through his case, when the defendant called one *Eastwick*. The plaintiff's counsel then examined him on the voire dire. He answered that he had been one of the directors and overseers of the poor of *Mary-le-bone* parish during the period when the contract was made. For the plaintiff it was contended, that, being one of the parties, he could not be examined, and his evidence was accordingly rejected, and the plaintiff had a verdict for 9*l.* 10*s.* *Petersdorff* moved for a rule to set aside the verdict and enter a nonsuit, on the ground that twenty-one days' notice of action had not been given, as was requisite by 35 *Geo.* 3. c. 73. s. 221., for the defendant, though an official person, might not be privy to the contract. He cited *Waterhouse* v.

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Keen (*a*); but the court held that the act did not apply to cases of contracts by the guardians, and that the case cited was in substance one of payment of money under duress. [*Parke* B. mentioned *Smith* v. *Shaw* (*b*).] *Petersdorff* then moved for a new trial, on the ground of rejection of evidence. The witness rejected having ceased to be a director, was indifferent to the event of the suit except as an inhabitant; and his testimony was therefore admissible, under section 214, by which inhabitants of the parish, though paying rates, are made competent witnesses in actions by or against the directors, &c. of the parish; as execution cannot issue against parties sued officially, and a mandamus is necessary to compel payment. A rule having been granted on the latter point,

E. V. Williams showed cause. The testimony of *Eastwick* was properly rejected, for he was in reality one of the defendants; and had it not been for section 214 of the *Mary-le-bone* act, by which the directors and overseers are to sue and be sued in the name of their clerk, the witness would have been a defendant on the record as well as the other directors. That section was not intended to change the legal liability of the directors, its only object being to prevent the inconvenient necessity of ascertaining every individual overseer, in order to prevent a plea in abatement, by thus suing them in the name of their vestry-clerk. Though not parties to the suit, they are declared against as parties to the promise on which it rests. In *Whitmore* v. *Wilks* (*c*), where the real plaintiffs were paving

(*a*) 4 B. & Cr. 200. See 6 East, 383; Holt's N. P. C. 27.

(*b*) 10 B. & Cr. 277.

(*c*) Moody & M. 214, 220, 222; and see Peake, C. N. P. 153; 3 Atkyns, 401; 3 East, 7; *Oxenden* v. *Palmer*, 2 B. & Adol. 236.

trustees, suing under a local act in the name of their treasurer for the time being, one of their own body was offered as a witness for them, and he was examined; but Lord *Tenterden* strongly inclined to think him inadmissible, and gave leave to move, though his evidence proving immaterial, no motion was afterwards made on that ground.

Bompas Serjt. and *Petersdorff* in support of the rule, were stopped by the Court.

PARKE B.—The guardians and directors are not made personally liable by any clause. Then as by a section of the act they shall sue and be sued in the name of their vestry-clerk, they are neither substantial or nominal parties. Had no such claim existed, and had they with the witness been made defendants in the action, none of them would have been parties personally liable. That, therefore, which was the sole objection to the witness, is taken away by section 214 of the act, which makes him competent as an inhabitant.

The other barons concurring,

Rule absolute for a new trial.

See *Emery* v. *Day*, *ante*, Vol. IV. 695; and *The King* v. *The Inhabitants of Bishop's Auckland*, 1 Adol. & Ell. 744.

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SUTTON *against* MARY ANN BURGESS.

In the body of a copy of a writ of capias delivered to a defendant, pursuant to 2 *W.* 4. c. 39. the sheriff was directed to take the defendant (a woman) "if *h* shall be found in your bailiwick," instead of *she*, the writ going on "and *her* safely keep." Held, an immaterial variance.

The copy delivered was thus indorsed, "if the amount thereof be paid within four days from the arrest or service thereof." Held sufficient, and that the words "arrest or" might be rejected as surplusage.

MANSEL moved for a rule to deliver up a bail-bond to be cancelled for irregularity, on entering a common appearance, on the ground that the copy of the writ delivered on the defendant pursuant to 2 *Will.* 4. c. 39. s. 4., was incorrect in the body of it, as it directed the sheriff to take *Mary Ann Burgess* &c. "if *h* shall be found in your bailiwick," instead of *she*, as correctly stated in the writ. He cited *Hodgkinson* v. *Hodgkinson* (a), where the King's Bench held the copy of a capias delivered to the party arrested insufficient, a word having been so written as to vary from the original in sense or sound, *e.g. Middesex* for *Middlesex*. [*Parke* B. was understood to dissent from that case.] Another ground of objection is, that the notice indorsed on the writ in stating the debt and costs claimed, concluded thus: "if the amount thereof be paid within four days from the arrest or service hereof," instead of "service thereof" only, which is the form provided by *Reg. Gen. Hilr.* 2 *Will.* 4. No. 2. [*Hilr.* 1. 1. 351.] The copy of a writ cannot be amended after service, *Byfield* v. *Street* (b). A rule having been granted,

Archbold showed cause. In *Pocock* v. *Mason* (c), the served copy of the capias ran "after execution hereof," omitting "the before execution;" and by order of the said court or any judge thereof, omitting "before any judge;" and it was held good, the meaning of the writ remained unaffected by the

(a) 1 Adol. & Ell. 533.

(b) 10 Bing. 27. See, however, *ante*, p. 130, *Hooper* v. *Walker*.

(c) 1 Bing. N. C. 245.

omissions, and the copy served was substantially a copy of the process. [*Parke* B. There is no variance if the sense of the writ is not altered.] As to the second objection, the material word "service" remains, which was omitted in all the other cases where indorsements have been held irregular. [*Parke* B. Plaintiffs have in this Court been allowed to amend such mistakes as these (a)] Mr. Baron *Gurney* refused to make an order on summons, and the costs of amendment after coming here will much exceed those on summons at chambers; but that course is not desirable. Besides, as the plaintiff has expressed in his copy all which he was bound to do, and more, the latter is merely surplusage.

Mansel contra. The first objection is fatal, for it is in the body of the writ, the copy of which is to be delivered to the defendant, in pursuance of 2 *Will.* 4, c. 39. s. 4, must be correct. In *Smith* v. *Pennell* (b), the indorsement on the writ specified *Old Jewry, London*, and the copy being *Old Jewry* only, was held bad. On the second point, *Hooper* v. *Walker* is decisive in favour of the defendant, as the plaintiff refuses to amend.

Lord ABINGER C. B.—This rule cannot be supported on the first ground, to which the case of *Pocock* v. *Mason* exactly applies. The defendant could not be misled as to the meaning of the process. As to the second objection, the words "arrest or," are mere surplusage, and may be rejected as such. The defendant had all the advantage of the longest period for paying the debt and costs, after the arrest or the service.

(a) See *Hooper* v. *Walker*, *ante*, 130; but see *Lakin* v. *Martin*, *ante*, Vol. IV. 839.

(b) 2 Dowl. P. C. 654.

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PARKE B.—No word different from the proper form is inserted in this copy, nor is any different sense introduced into it. The case is therefore stronger than *Pocock* v. *Mason*. As to the other point, the copy was not delivered to the defendant till after the arrest; she must have known when she was so served, and had four days after such service to pay the debts and costs in. The words "arrest or," are therefore surplusage.

BOLLAND B.—The writ goes on, "and *her* safely keep if found."

GURNEY B. concurred.

On *Archbold*'s stating that *Gurney* B. had refused to make an order on a summons to the like effect as this rule,

Rule discharged with costs.

ASHTON and Others, Executors, *against* POINTER.

Executors declared in one count on a contract by the defendant with their testator, and in another on a contract by the defendant with them to pay money due to the plaintiffs as executors on an account stated between them, with a promise to pay them as executors, and a verdict was found for the defendant: Held, that he was entitled to his costs of the last count under 23 *H.* 8. c. 15., and that the court has no power to interfere under 3 & 4 *W.* 4. c. 42. s. 31. in favour of the plaintiffs as executors.

ASSUMPSIT. The action was commenced in *October* 1832. The declaration delivered in the *November* following contained counts for goods sold &c., in the time of the testator, with promises to him and to the plaintiffs, as executors, with a count on an account stated with the plaintiffs personally. The case being referred, the umpire, on 15 *April* 1834, ordered a verdict to be entered for the defendant generally, and the master taxed him all the costs of the cause. *Kelly*, for the plaintiffs, had obtained a rule to show cause why the master should not review his

taxation herein, by disallowing the defendant his costs of the trial of this action, or why it should not be confined to the costs of the count on an account stated with the plaintiffs as executors.

Alexander showed cause. The defendant abandons his claim to costs on any issue except that on the account stated. Several late cases before 3 & 4 *Will.* 4. c. 42. s. 31. show him entitled to those costs under 23 *Hen.* 8. c. 15. For in *Dowbiggin, administratrix*, v. *Harrison* (a), the plaintiff sued as administratrix, on promises to the intestate, and also on an account stated with her as administratrix, of monies due to her in that character, with a promise to pay her as such; and it was held, that it thereby appeared that the "contract" was one "made between the plaintiff and another person" within 23 *Hen.* 8. c. 15, and therefore, that after a nonsuit the defendant was entitled to the costs of that count only. That decision was followed up in *Jobson, administratrix*, v. *Foster* (b), after a verdict for the defendant, though the count on the account stated alleged that it was stated with the plaintiff concerning money due from the defendant to the intestate at the time of his death; and again in *Slater, executor*, v. *Lawson* (c), after a nonsuit, though there was no count stating an account stated between the plaintiff as executor and the defendant. Then is the law altered by 3 & 4 *Will.* 4. c. 42. s. 31., which by the express enactment of s. 44. came into operation on 1 *June* 1833, though not passed till 14 *August* in that year? That section enacts, "that in every action brought by any executor or administrator, in right of the testator or intestate, such executor or adminis-

(a) *T.* 1829. 9 B. & Cr. 566. (b) 1 B. & Adol. 6.
(c) *Hil.* 1831. *Id.* 893.

in which he would be liable in such plai
suing in his own right upon a cause of action
to himself; and the defendant shall have
for such costs, and they shall be recovera
manner." It speaks affirmatively of, eve
brought by any executor or administrator,
of the testator or intestate;" and therefore
affect the previous law as to actions broug
executor or administrator, in neither of suc
for affirmative words cannot abrogate a
affirmative statute, viz. in this instance 23 He
Dr. Foster's case (*a*). The new act was int
prevent the previous evil of bringing actions
tors, who shrouded themselves from payment
by their representative character. No suc
venience arises in this case, and stat. 3 &
seems confined to cases in which the execut
right of his testator or intestate, and the
action was complete at the time of the deat
in this case, the last count is on a promise to
cutor in his representative character. T
Lysons v. *Barrow* (*b*), the C. P. held the co
an action by an executor to recover the a
sured by a policy on the life of his testato
ground that it was the plaintiff's duty to att
recovery of the money; that case has si
doubted. It was not cited in *Wilkinson, exe*

tiff from costs under the new act (a). It is to be observed, that it does not appear that in that case there was any count on which the plaintiff could only have sued as executrix, viz. on promises to testator. *Woolley* v. *Stoper* (b) was a case on promises to testator only. *Freeman* v. *Moyes* (c), and *Pickup* v. *Wharton* (d), have established that this enactment of 2 & 3 *W.* 4. c. 42. has a retrospective operation.

Kelly supported the rule, contending, on the authority of *Lysons* v. *Barrow*, that the late statute applied to the whole action; and secondly, called on the court to exercise the discretion given them, to exempt the plaintiffs from the costs of all the issues but that on the account stated.

PARKE B.—On considering the case of *Lysons* v. *Barrow* attentively, it appears that counsel intended to raise this point, but that it was either not pressed on the court, or not considered in the judgment, which assumes throughout that they had jurisdiction. Since it was decided, the question has occurred in the King's Bench; and that court agrees with us in opinion that *Lysons* v. *Barrow* cannot be supported. The intent of section three of 3 & 4 *W.* 4. c. 42. was to impose on executors a greater liability than that to which they were before subject; but the court has no jurisdiction under it in a case where an executor sues on a contract made with himself. For if he fails in such an action he is liable to pay costs under 23 *Hen.* 8. c. 15., and the act of *W.* 4. does not vest in us any discre-

(a) Or in *Southgate* v. *Crowley*, 1 Bing. N. C. 518. *Hil.* 1835, a similar application.

(b) 9 Bing. 754.

(c) 1 Adol. & Ell. 341.

(d) *Ante*, Vol. IV. p. 994.

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tion to exempt him from them. Had that act app this motion should have been made before the tax took place.

BOSLAND, ALDERSON and GURNEY Bs. concurr

The rule was made absolute to exonerate the p tiff from paying costs on the three first counts, discharged with costs as to the last count (*a*).

(a) In *Southgate* v. *Crowley*, *Hil.* 1835, 1 Bing. N. C. 518, the C. C. P. held, *Vaughan* J. dissentiente, that if an executor fails in his a a contract with his testator, the circumstance that he commenced it fide for the benefit of the estate, will not entitle him to be exempt costs, pursuant to s. 31. of 3 & 4 *W.* 4. c. 42.

JENKINS, Executrix, *against* HARVEY.

In 1795 the corporation of *Truro* let to the plaintiff's testator the office of meter of the borough, with all fees, emoluments, &c. arising from the measuring of coal, &c.

ASSUMPSIT by the executrix of a lessee of corporation of *Truro* for metage, viz. a toll or duty of 4*d.* per chaldron on all coals imported by into that port. The first count of the declaration st that the borough of *Truro* in the county of *Corn* is an ancient borough, and the port of the said bor is an ancient port, and that the mayor and burg of the said borough and their predecessors for the

which should be imported or exported within the limits of the borough, after p the corporation's right to toll. In assumpsit for this toll it was proved, tha 1772 to 1828 (fifty-six years) their lessees had received 4*d.* a chaldron up measuring all coal imported as above. The judge told the jury that he knew n of law which, upon the evidence of modern usage laid before them, would p them from presuming the immemorial existence of the right to the payment; b not inform them that the plaintiff might be entitled to it as a port-duty, and fore, not against common right, or requiring an origin so ancient as the time o memory:—Held, that though this omission might not amount to a misdirec new trial must be granted.

being, from time whereof the memory of man is not to the contrary, have had and exercised, and been used and accustomed to have and exercise, and still of right ought to have and exercise, by the mayor of the said borough, or the lessee or lessees, farmer or farmers of the said mayor and burgesses for the time being, or their deputy or deputies, servant or servants, a certain ancient office or place of meter, for (amongst other things) the measuring of all coal imported by sea and brought within the limits of the port aforesaid to be there unloaded, delivered, or disposed of. And also that from time whereof the memory &c., there hath belonged, and still doth belong to the said mayor and burgesses of the said borough and their predecessors, or their lessee or lessees, farmer or farmers, for the time being, by reason of the said office, a certain ancient fee, reward, perquisite, or toll, for the measuring as aforesaid, and for the keeping and maintaining of measures, weights, and other machines and conveniences, for the purpose of measuring, *i.e.* the fee, reward, or toll of 4*d.* for the chaldron, to be had and received for the measuring, or being ready and willing to measure, by measure, each chaldron of coal aforesaid imported by sea and brought within the port aforesaid, and deliverable, or to be unloaded, delivered, or disposed of by measure, and the fee, reward, or toll of 8*d.* by the three tons to be had and received for the weighing, or being ready and willing to weigh, each three tons of coal imported and brought as aforesaid, deliverable, or to be unloaded, delivered, or disposed of as aforesaid by weight: the said fees, rewards, or tolls, to be received and taken by the said mayor of the said borough for the time being, or the lessee or lessees, farmer or farmers, of the said mayor and burgesses for the time being, or his deputy or deputies, servant or servants thereof. That heretofore, and before the

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making of the promise and undertaking thereinafter mentioned, to wit, on the 25th day of *November* 1795, the said mayor and burgesses, &c. being so entitled to the said fee, reward, or toll, and the said office as aforesaid, by a certain indenture then and there made between *E. Lawrence*, gentleman, then being mayor of the said borough of *Truro*, and the burgesses of the said borough, of the one part, and one *S. Jenkins* of the other part, (the counterpart of which indenture, sealed with the common seal of the said borough, the plaintiff's executrix as aforesaid brings into Court,) the said mayor and burgesses, for the consideration therein mentioned, did grant, demise, lease, set and let unto the said *S. Jenkins*, his executors, administrators, and assigns, the said office or place of meter of the said borough, together with all advantages, profits, emoluments, fees, perquisites, and rewards whatsoever, arising or accruing from the measuring of all corn and grain, coals, culm, and other such like commodities, that should be exported or imported within the limits of the port of the said borough, in such sort and manner as the same was then or had been formerly paid and enjoyed, and all the rights and privileges thereunto belonging or appertaining; to have and to hold, exercise, and enjoy the said office or place of meter of the said borough aforesaid, with the appurtenances as aforesaid, unto the said *S. Jenkins*, his executors, administrators, and assigns, for and during and unto the full end and term of ninety-nine years fully to be complete and ended, if *L. B. Jenkins*, then aged four years, or thereabouts, daughter of the said *S. Jenkins*, should so long live. The said term to commence from and immediately after the death of one *P. T.* and *E. T.* his brother, or the surrender, forfeiture, or other sooner determination of the said then term, &c. of the said *P. T.* of and in the same, determinable

on their death; he the said *S. Jenkins* yielding and paying therefore, as in the said indenture mentioned, 3*l.* payable quarterly. That afterwards, and during the said term of ninety-nine years by the said indenture granted, and during the life of the said *L. B. Jenkins*, to wit, on the 1st of *January* 1820, in &c., the said *P. T.* and the said *E. T.* died, and that thereupon, by virtue of the said demise, the plaintiff, as executrix as aforesaid, afterwards, and during &c., entered into and upon the said demised premises with the appurtenances, and became and was possessed thereof, as executrix as aforesaid, for the residue of the said term so to the said *S. Jenkins* and his executors thereof granted as aforesaid, he the said *S. Jenkins* having previously and during &c., to wit, on the 1st of *January* 1834, died, and having theretofore, to wit, on &c., duly made and published his last will and testament in writing, and appointed the plaintiff executrix thereof, to wit, &c. That the said *L. B. Jenkins* is in life, to wit, &c. That afterwards, and during the continuance of the said term, and the interest of the plaintiff as executrix as aforesaid, and before the making of the promise and undertaking hereinafter in that count mentioned, to wit, on the 1st of *October* 1832, in the county aforesaid, divers, to wit, 9000 chaldrons, and 9000 tons of coal, had been and were by the defendant imported by sea in a certain ship or vessel, and brought within the limits of the port aforesaid, there to be unloaded, that is to say, the said chaldrons by measure, and the said tons by weight. The second count claimed the same fee and reward as the perquisite of an office of meter generally, without stating it to be an ancient office from time immemorial. The third count claimed a reasonable fee. The fourth was on a *quantum meruit*. The fifth stated the borough of *Truro* to be an ancient borough, and the port of *Truro* to be an

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ancient port. That the mayor and burgesses of *Truro* were on the 26th *November* 1795, and long before, and hitherto have been, used and accustomed to receive, as of right, a certain duty or toll (4*d.* per chaldron) called metage, of and from every merchant importing amongst other things coal by sea, and bringing the same within the limits of the port aforesaid. That the said mayor and burgesses, being so entitled, did on that day grant and demise unto the said *S. Jenkins* the said office and place of meter, with all advantages and profits, &c. as before; after deducing title to present plaintiff as before, it stated the importation of 9000 chaldrons of coal by the said defendants to be unloaded within the limits of the port; by reason of which the defendants became liable to pay to the plaintiff the aforesaid duty or toll of 4*d.* upon every chaldron so imported; and that the defendants, being so liable, promised to pay the sum of 150*l.* The sixth count claimed toll of coal imported and unloaden within the limits of the port of *Truro*, in which port the plaintiff had kept certain measures for the purpose of measuring the coal of such as were disposed to use them. The seventh count was for tolls, in respect of the defendants having used the said weights and measures. The eighth, for toll called metage, for and upon divers coals imported. The ninth, for weighage, portage, and bushelage. The tenth, for port-duties upon goods and merchandize. The eleventh, for tolls upon goods, &c. The twelfth, for petty customs. Other counts for work done, and materials provided, the money counts, and a count upon an account stated. Plea (before the new rules), the general issue.

At the trial before *Williams* J., at the Lent assizes for *Cornwall* in 1834, the plaintiff put in the following documents in support of his claim:—

An extract from Doomsday, to show that *Tru*

(written '*Truergw*,') was not then "Terra Regis," or ancient demesne, but was held of the king by *William*, Earl of *Morton*, brother of the conqueror, and Earl of *Cornwall*.

A charter of *Reginald Fitzroy*, Earl of *Cornwall*, son of *Henry the First*, addressed to "all the barons of *Cornwall*, and all knights and all free-tenants, and all men, 'tam Anglicis quam Cornubiensibus,'" and granting to his free subjects of *Triverien*, 'sac et soc, *thol*,' &c.

An inspeximus charter of confirmation, 13 *Edw.* 1.

A charter of 31 *Eliz.* (the governing charter) reciting that the port of *Truro* was part of the port of *Falmouth*, and that the inhabitants of *Truro* endeavoured by all means to preserve the port, by cleansing and repairing the same, and that the inhabitants of the said borough enjoyed many franchises, &c. &c. as well by prescription as by divers charters &c., and confirmed to them all privileges, &c. (*a*).

A lease, dated 21 *Feb.* 1752, from the corporation of *Truro* to *S. Tippett*, granting and demising, in consideration of the sum of 631*l.*, the office or place of meter of the borough, together with all advantages, profits, emoluments, fees, perquisites, and rewards whatsoever arising or accruing from the measuring of all corn, grain, coal, &c. which should be exported or imported within the limits of the port of the borough, for a term of 99 years; and containing a covenant to indemnify the lessee from all charges incurred in defending any action brought against him on account of his demanding or taking any of the usual and accustomed dues belonging to the meter.

A lease, dated 26 *Nov.* 1795, resembling the last, and granted by the corporation of *Truro* to *Silvanus*

(*a*) See this charter in *The Mayor and Burgesses of Truro* v. *Reynolds*, 8 Bing. 275.

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Jenkins, the testator, of the office or place of meter &c., together with all advantages &c., for the term of 99 years, with a covenant of indemnity as in the lease of 1752. A list of the dues to be levied was indorsed on the lease, containing, inter alia, "coals by the chaldron, 4*d*." The lessee had been rated to the poor in respect of the metage from 1772, and to the church-rate from 1779. Witnesses proved that the dues claimed had been paid from 1772 to 1828, and stated the following to be the mode of measuring coal. The weights and measures used belonged to the crown. One man measured for the merchant and another for the corporation, the account being kept by the corporation meter, who stood by, and was also the custom-house officer appointed to collect the duties on coals carried coastwise (*a*). Any officer who helped to measure was paid extra for his work. It was also proved that the corporation perambulated the bounds of the port every seventh year, and marked them by poles fixed in the rock, and by the letters T. B.; that they cleansed the bed of the river from time to time, and received anchorage. The defendant admitted that his wharf was within the port, as well as that he had imported certain quantities of coal thither, which the corporation officer had offered to measure, which offer he had refused; but offered no evidence. The learned baron left it to the jury to say whether the office of meter was an immemorial office as laid? He added, that in order to establish the affirmative, the plaintiff must satisfy them that that office and the toll existed from before the time of legal memory; that in order to arrive at a conclusion upon that subject, they might consider whether a toll of 4*d.* would be reasonable at the early period of *Richard the First*; but that he knew no law which would prevent their presuming, from the modern usage only, as proved by

(*a*) Repealed in 1831, by 1 & 2 *W.* 4. c. 16. s. 1.

parol evidence, that the right had a legal origin by a grant made by some person entitled to make it before that period. During the summing up of the learned baron, *Wilde* Serjt., for the plaintiff, submitted that the 4*d.* might be claimed as a port duty payable to the corporation in respect of their franchise, or as owners of the port, under some grant of less antiquity than the time of legal memory; but it did not appear that the learned baron so put it to the jury, or that he left it to them to say whether the corporation were owners of the port. Verdict for the defendant. In last *Easter* term a rule was granted for a new trial on two grounds; first, that the judge had misdirected the jury; and secondly, that they had found a verdict against the weight of evidence, in consequence of not receiving any direction respecting its application and bearing, as regarded the presumption of legal origin. It was contended that the jury should have been told, not only that nothing prevented them from presuming a legal origin to the right, but that, in the absence of all proof to the contrary, the plaintiff's evidence of long usage was so cogent, that they ought to be guided by it; and *Rex* v. *Joliffe* (*a*) was cited.

Merewether and *Coleridge* Serjts. showed cause for the defendants in this term. A new trial is not the necessary result of evidence not being presented by a judge to a jury so strongly as its relative weight may deserve, or as it usually is put, unless a part of it is withdrawn from them. The present case depended on proof of usage; and if the facts adduced in support of it were of modern date, the judge did right in placing them on a lower scale than he would have done in stronger cases. [*Parke*, B. The case certainly was

(*a*) 2 B. & Cr. 54.

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not put so strongly in favour of modern usage as judges have considered themselves bound to put it. The learned baron told the jury that there was nothing to prevent their presuming a grant from the evidence given; but I think he should have told them, that upon that evidence, uncontradicted as it stood, they were bound to presume it till the contrary was shown. Were this otherwise, many ancient rights, for instance, exemptions from tithes, could not be supported at all. It is not the usual mode of leaving these questions to a jury to say that they are at liberty to make a presumption.] The point was at all events substantially left to the jury. This was a case not wholly free from suspicion, for the chasm in the documentary evidence between the charter of 31 *Elizabeth* and the lease of 1752 was not filled up; and other facts appeared, showing that for many years the payments were either compelled, or made by mistake for duties of customs. Then the presumption of legal origin was so much weakened, that the judge was right in not calling on the jury to give that weight to it which uninterrupted enjoyment, without question or suspicion, is entitled to. Nor was the verdict contrary to evidence. The plaintiff claimed the payment either as metage, viz. a fee in respect of the office of meter, which he alleged to be immemorial, or as a port duty. But there is no trace of such a claim in any of the charters produced. On the other hand, the charter of 31 *Eliz.* enumerates the officers of the corporation, without mentioning a meter, though it specifically mentions constables and other officers of undoubted antiquity. [*Parke*, B. The answer to that observation would be, that as from time immemorial the corporation had the power of appointing a meter it would not be found in the charter. Indeed, had it authority to elect him, it would have been a strong argument against its being an immemorial office there.

The charter of *Eliz.* expressly gives anchorage, which is a payment in nature of a port due, for every vessel anchoring in the port. It also gives weighage, but not metage. There is then a chasm in the title to these payments till 1752. No account is given of these payments between that charter and 1752, though documents relating to that interval must be presumed to be in the hands of the corporation. Now though rights long exercised are of necessity to be presumed legal, where no records exist, that rule ceases to apply where they exist and are not produced. The *weight* of evidence of payment is much diminished by the following facts as to the shape in which it appeared to be claimed, and was collected. The lease of 1752 was granted to the then officer of customs, who being obliged, as such, to attend and see the coals measured in order to levy the coast duties, had particular facilities for receiving the additional payment claimed by the corporation as metage. The lease granted the office of meter with such dues as had been formerly and usually paid. After the date of this lease, as might be expected, the dues for metage and the duties of customs on coals carried coastwise were confounded together, being charged in the same paper, and collected by the same person and at the same time. In this state matters continued till the abolition of the coast-duties in 1831, when the plaintiff purchased the weights and measures from the crown. Beyond this ambiguous evidence nothing was proved, except the reception of the dues from 1772 to 1828. In *Rex* v. *Joliffe* (*a*), a regular usage for twenty years, for summoning a jury by a bailiff, unexplained and uncontradicted, was held sufficient to warrant a jury in finding the existence of an immemorial custom; and *Abbott*, C. J. said, "Upon the evidence given un-

(a) 2 B. & Cr. 54. See 3 Wils. 63; 2 M. & S. 92; 11 East, 491; Bac. Abr. Custom, (C).

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contradicted and unexplained, I think the learned judge did right in telling the jury that it was cogent evidence upon which they might find the issue in the affirmative;" and afterwards added, "A regular usage for twenty years, not explained or contradicted, is that upon which many public and private rights are held, there being nothing in the usage to contravene the public policy." (*a*) But admitting the truth of those positions, the evidence in this case is not cogent, but clouded by ambiguous and suspicious circumstances, and the usage has not a reasonable commencement. The very covenant for indemnity would show that the usage had not been unquestioned as long ago as 1752. The importation of sea-borne coals is far within time of legal memory. Stat. 8 *H.* 6. c. 5. shows it to be the duty of the corporation to have common weights and measures; but it fixes the payments for using them. Is the metage fee to be paid whether the measuring is required or not? What the corporation have received, may have been legally taken for their duty in attending the weights under 8 *H.* 6. c. 5. [*Parke* B. The corporation has the exclusive right of meting whenever it is required. I should conjecture that the right of a meter to mete, whether it was required or not, was to remunerate them for keeping the port in repair.] Nor can this action be maintained as for a port duty upon the *indebitatus* count, for if there is a right to any payment in the nature of a town due or port duty, the corporation, and not the plaintiff, are the proper parties to sue; for the lease of 1795 does not convey to the lessee any right to port duties. [*Alderson* B. All that is conveyed to *Jenkins* by that lease is the metage.] If the payment be considered as a port due, the plaintiff cannot pray in aid the modern usage to strengthen her title, by the presumption of a grant; for the per-

(*a*) And see *Jones* v. *Waters*, *infra*, p. 361.

ception of the profits by her and the testator must have a reference to the lease under which they held. Nor can the payment be supported as a port duty, for no sufficient consideration is shown for it. The well-known rule is, that no charge can be imposed upon the subject without a corresponding benefit. Thus, a person cannot prescribe for toll thorough, without at the same time alleging a consideration, as, that he repairs the highway; for, the public having a general right of passing through highways, cannot be so charged without receiving a corresponding benefit; *South* v. *Sheppard*(a), *Truman* v. *Walgham*(b). In *Colton* v. *Smith*(c), a prescription by a lord of the manor for toll of all goods landed within the manor, was held good, by reason of the consideration of repairing a wharf: Lord *Mansfield* remarking, "In this case, every body that pays has a benefit." In *Warren* v. *Prideaux*(d), the prescription was for a toll in consideration of maintaining a quay; and *Hale* C. J. said, "If he had said that he and all those whose estate he had, had a port, and were bound to maintain that port, *that* might have been a sufficient prescription; but in this case there must be a specific inducement and compensation to the subject, by reason of those statutes by which all merchants and others have liberty to come in and go out." But here it was not in evidence that the corporation were bound to repair the port, or that there was any other consideration for demanding this payment as a port duty.

Sir *William Follett*, Solicitor-General, and *C. C. Rowe*, contrà. This rule was moved for, first on

(a) Moore, 574, a.

(b) 2 Wils. 299. See also *Mayor of Nottingham* v. *Lambert*, Willes, 111; Pelham v. *Pickersgill*, 1 T. R. 660.

(c) 1 Cowp. 47.

(d) 1 Mod. 105.

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the ground of a misdirection; and secondly, not on the ground of the verdict being against the weight of evidence, but on this additional ground, that the learned judge, by omitting to direct the jury as to the bearing and application of the plaintiff's evidence upon the question of prescription, had in the result misled them into giving a verdict against its proper operation.

First, with regard to the misdirection. In his summing up, the learned judge did not sufficiently inform the jury with regard to the nature and weight of the evidence requisite to sustain a prescription. He should have told them, that a long continuance of modern usage, unbroken and uncontradicted, was cogent evidence of a prescriptive origin. Nor did he distinguish between a claim to the profits of an immemorial office, and a claim to a port due, which might originate in modern times. Though these were omissions only, they amount to a misdirection. But further, the learned judge told the jury that nothing upon the evidence before them prevented them from presuming a grant of the toll, if they thought that such grant was anterior to the charter of *Elizabeth*, or the time of legal memory; but he never told them that such a grant, if of port duties, might be made at a subsequent period. [*Parke* B. Did you distinctly claim the payment quà toll under any lost grant? If you did not, why should the judge put it in that shape to the jury? The plaintiff opened his case, not as one of a lost grant, but as a claim for a port duty of 4*d.* a chaldron upon coal imported (*a*); and rested his claim on the presumption of legal origin, arising from a possession of seventy years. Now metage or measurage is described by Lord *Hale* (*b*), as a toll due for the use of

(*a*) Brownlow's Redivivus, 819.

(*b*) De Portibus Maris, Hargrave's Law Tracts, 76.

common bushel or other instrument to measure dry or wet goods, imported or exported, and is by him enumerated as one of the payments made at different ports, under the title of port duties or petty customs. The plaintiff claims precisely this species of toll, and it may be recovered under the common count. But the learned judge never explained to the jury the effect of that evidence of possession upon the plaintiff's demand. The title of the plaintiff to this payment as a port duty clearly appeared; but it is now objected that it cannot exist on account of the want of consideration, where parties do not require their coals to be weighed or measured, and that it would be extreme hardship to make this payment imperative, whether the meter is called upon to perform his duties or not. But that is a fallacy, for the weighing is not the only or main consideration for the claim. For as owner of the port of *Truro*, the corporation is entitled to this payment as well as many others. A subject cannot create a port, which is a royal franchise, but the crown may grant such franchise to a subject, as appears from many instances collected in Lord *Hale's* treatise *De Portibus Maris* (*a*). To such a grant from the crown must be referred the rights of ownership of the port of *Truro*, which have been exercised by the corporation. Thus they have reserved anchorage from all ships coming to anchor within the port, of which payment Lord *Hale* says, it is a payment due to the owner of a franchise of a port (*b*). They have constantly received quay dues. The charter of *Elizabeth* only affirms those rights which were previously enjoyed. Though the crown could grant the franchises of a port, the previous rights of the owner of the shore made that grant of

(a) Hargrave's Law Tracts, cap. vi. p. 72.
(b) *Id.* p. 74.

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little value, except when made, as it generally wa the owner of the soil. Then this corporation b owners of the soil, and by charter, of the port, afforded sufficient consideration for paying this duty, by permitting the soil to be dedicated to use of a port. Now, the liberty of bringing g into port for safety, of itself imports a consideratio a toll there imposed under the name of weigh *Mayor of London* v. *Hunt* (*a*). So the landing g within the manor is a sufficient consideration, whe they are placed on a wharf or not, *Crispe* v. . *wood* (*b*). The *Mayor of London* v. *Hunt* is re nized by Lord *Mansfield*, in the *Mayor of Yarm* v. *Eaton* (*c*), where he says, "the making a port i itself a consideration. It is a self evident conveni to the merchant. It speaks for itself; it may neve quire repairs, therefore I do not know that it is ne sary to show repairs;" and *Wilmot*, J. added, th consideration must be shown for a toll thorough b against common right, but a port duty of itself imp a consideration to support it.

Further, the corporation sustain certain burthe cleansing the port and keeping up its boundarie well as in maintaining bushels and weights and s for the measurement and weighing of goods. obligation to perform duties is a sufficient considera for though the performance of them be rejected, corporation may be indicted for neglecting them. appears from *Vinkensterne* v. *Ebden* (*d*), which was ver for an anchor &c. seized for toll on coals expo from *Newcastle*, where Lord *Holt* said, there wa necessity to aver that the port was in repair; for

(*a*) In error in the Exchequer Chamber, 3 Lev. 37.

(*b*) Id. 424. (*c*) 3 Burr. 1406.

(*d*) 1 Lord Raym. 384; 1 Salk. 248. *S. C.*, and the *Malden* case cited from 3 Keble, 532.

consideration is, that they have used, time whereof &c. to repair &c., so that the consideration is not the actual repairing of it, but that they have been time whereof &c. obliged to repair. It was therefore unnecessary to show the actual weighing or measuring of the goods in respect of which the toll is claimed. Again, in *Haspurt* v. *Wills* (a), it was said, that a claim to toll for wharfage and cranage in the city of *Norwich* would be good, had it been for goods landed on the quay, or had the river been claimed by the plaintiffs (b). *Warren* v. *Prideaux*, cited for the defendant, only proves that where a toll is claimed on the sea, or a navigable river, a clear consideration must be shown; Lord *Hale* saying, "If any man will prescribe for a toll on the sea he must allege a good consideration, because by *Magna Charta* and other statutes every man has a liberty to come and go upon the sea without impediment." In *Earl Falmouth* v. *George* (c) a claim for toll of a capstan was disputed, on the ground that there was no consideration with regard to the boats which did not use it; but *Best* C. J. said, "Though the fishermen may not always use the capstan, yet it is of advantage to them. The keeping of a capstan for such a purpose is a sufficient consideration for a reasonable toll." *Rex* v. *Montague* (d) is in principle distinctly in point for the plaintiff, and is even a stronger authority than *Rex* v. *Joliffe*, already cited. Though the port dues are not eo nomine conveyed by the corporation to the plaintiff, she may sue under the lease of 1795, which conveys the office of meter, with "all advantages, profits, emoluments, fees, perquisites and rewards arising or accruing from the measuring of all corn &c." The claim made is un-

(a) 1 Mod. 48.

(b) As to this latter circumstance, see 3 Lev. 38, *Mayor of London* v. *Rust*.

(c) 5 Bing. 286.

(d) 4 B. & Cr. 598.

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doubtedly for a fee for measuring. [*Parke* B be that the office of meter was not immemorial, the corporation in more modern times annex their ancient right to receive this species of p If so, that right would pass by the lease.]

PARKE B. (*a*)—I am of opinion that this cas undergo a fresh investigation, chiefly on the gro this claim may be supported as a port duty, the plaintiff was intitled in right of the cor Now it appears that the learned judge om leave to the jury whether or not the plaintiff titled to recover as for an ancient port duty, there was evidence on which that might ha found in her favour. There can be no doub port duty may be created within time of mem the crown may grant to a subject the fran making a port subject to the obligation of repa and may confer on the owner of the soil, thus d to the public, a compensation from those who port in the shape of dues to be paid by them u various matters imported. And it is quite sett such payments may be enforced, though not to have been made from time immemorial.

As to the other objections, after looking at th of the learned judge, we cannot say there ha misdirection, though it was most important in a garding ancient rights, that the nature of the e as it affected them, should have been more d explained to the jury. The proper mode of pr the point to them would have been, that from interrupted usage of at least fifty years, th warranted in presuming, and ought to presu the payment had been made from time imm

(*a*) Lord *Abinger*, who while at the bar had led this cau defendant, was sitting in equity.

unless some evidence was given to the contrary. That is the usual and ordinary way in which such questions are left to juries, and it is very material to the rights of many individuals, that the rule should be adhered to in the cases of ancient rights, not only to tolls, but in many other cases of public exemptions depending on usage, particularly moduses. But the learned judge is stated not only to have omitted to direct the jury that they ought to make such presumption, unless some evidence to the contrary appeared, but merely to have told them that he knew of no rule of law to prevent them from presuming the immemorial existence of the payment from the evidence of the modern usage. Nor did the learned judge inform the jury that the claim in question might have had its origin within time of legal memory; on the contrary, he pointed out to them the amount of 4*d.* a chaldron for metage of coals as one of the matters to be considered by them in deciding whether it was an immemorial payment. The jury would therefore consider the claim as one necessarily depending on immemorial usage—a point of view in which the difference in the value of money so presented to them would probably have considerable effect on their verdict. For these reasons, but principally because the learned judge did not instruct the jury that the plaintiff's claim to this payment might be sustained as a port duty, and confined their consideration of the case to a question of immemorial usage, I think that, without adding a word of opinion on the weight of the evidence, the case should be sent to another jury.

BOLLAND B. concurred.

ALDERSON B.—It appears to me that the summing up of the learned judge was calculated to mislead the jury; for, as was well put by the counsel for the plain-

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tiff, the plaintiff's claim was, in terms, left to them as claim against common right; whereas had it been pr sented to them as one in the nature of a port dut they would have seen that there was a correspondi benefit to the party from whom the payment w claimed, and therefore that it could not be consider a claim against common right. On the other poin am clearly of opinion that too little stress was laid the learned judge on the usage of modern times. it should be held that so little weight is to be attach to usage of the duration here proved, unimpeached evidence to the contrary, very few of those importa rights which depend on proof of long usage could co tinue to exist.

GURNEY B. concurred.

Rule absolute without costs.

BUCKWORTH *against* SIMPSON and Another.

Assumpsit for not keeping premises in repair is a transitory action.

An instrument executed in 1805 was then stamped with a 15*s.* stamp as an agreement, being in reality a lease, and such liable to a 1*l.* 10*s.* stamp. In 1834 it was stamped in pursuance of 37 *Geo.* 3. 136. s. 2. with a 1*l.* stamp, that being the lease stamp imposed in 1815 by 55 *Geo.* c. 184., which repealed the existing duties. Held, that it was properly stamped

Lands were let for a year certain, and then from year to year, so long as the p ties should think proper, with power to determine the lease on giving notice quit. The lease then contained various terms as to repairing and cultivation. T tenant occupied under the lease and died; his executors entered on the demi premises, and continued to occupy them, paying rent for several years. Held, they were personally liable for breaches of the stipulations to repair and culti contained in the original lease, and were properly sued in assumpsit on an imp promise to perform them, founded on the consideration of their continuing to occ and the lessor's abstaining from giving notice to quit.

ASSUMPSIT. The first count of the declaratic stated an agreement, dated 6th *December* 1805, b which *M. Buckworth, J. C. R.* and *P. A.*, as truste and testamentary guardians of the plaintiff, let a me suage, land, and premises, in the county of *Lincol*

to one *Barber*, to have and to hold from the 6th day of *April* then next ensuing, for and during the term of one year from thence to be complete and ended, and thenceforward from year to year, so long as all parties should think proper, either of them giving notice in writing to the other of his wish and intention to determine the said demise and tenancy, at least six months previous to the expiration of any one year, at the rent therein mentioned. *Barber* also agreed to keep the buildings and premises in complete repair, and to leave them in good and tenantable repair at the end of the year when they should be quitted, and to manage the farm according to certain specified terms. The declaration then stated that the plaintiff came of age on 22d *December* 1815, and that in consideration that he had undertaken to let the premises to *Barber* on the same terms as in the agreement made with his guardians, *Barber* undertook to perform the same in all things on his behalf to be performed; that on the 5th *January* 1821 *Barber* made his will, and authorized the defendants to continue his business in trust for certain persons and purposes, and died on 2d of *March* 1821; that the two defendants proved the will, and that all the estate, right, title, and interest of the said *Barber*, of, in, and to the said demised premises, came by assignment to the defendants. It then further alleged, that in consideration of the premises, and that the plaintiff would permit them to continue in possession of the demised premises as such assignees, and would omit to give them six months notice to quit at the proper time, and according to the terms in the agreement mentioned, the defendants undertook to perform the agreement in all things to be performed on the behalf of the said *Barber*. It was then averred, that the said *Barber* was tenant to the plaintiff until his death, and that

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after his death the defendants became and were the tenants, and continued as such tenants in possession to the plaintiff for a long space of time, to wit, until the 6th *April* 1833; and although the plaintiff suffered them to remain in possession, and omitted to give them six months' notice to quit at the proper time and according to the terms of the agreement, yet that the said defendants, as such assignees as aforesaid, during the tenancy since the death of the said *Barber*, until the 6th *April* 1833, did not keep the premises in repair, but delivered them up on that day in a bad and untenantable state of repair. In another count the allegation that the trustees let the premises was omitted, and it was stated that *Barber* took them from the plaintiff, and promised to keep them in complete repair. A subsequent count was similar, except in alleging *Barber*'s agreement in more general terms, and also averring that on *Barber*'s death the premises came to the defendants by assignment, and that they engaged to use them in a proper and tenant-like manner during the tenancy. The last count was for use and occupation. The action was commenced before the new rules.

Pleas, the general issue and statute of limitations by defendant *Simpson*, and issue thereon. Judgment by default was suffered by the other defendant. The venue was laid in *Middlesex*.

At the trial before *Gurney* B. at the *Middlesex* sittings after last term, it appeared that *Barber* took certain premises in *Lincolnshire* on an agreement with the trustees, dated 6th *December* 1805, as stated in the declaration, and occupied them till his death. The original of that agreement was produced, stamped with a 15*s*. agreement stamp, and also a 1*l*. lease stamp. The defendants objected, first, that the cause of action being local in *Lincolnshire*, the venue should have

been laid there; secondly, that the stamp should have been 1*l.* 10*s.* according to stat. 44 *Geo.* 3. c. 98. in force in 1805; thirdly, that the executors were not proved to have expressly agreed to hold the premises on the terms on which *Barber* held them, as alleged in the declaration; and lastly, that the legal estate appeared not to be in the plaintiff, but in his trustees. In answer to questions by the learned judge, the jury found that the defendants had become tenants to plaintiff after *Barber*'s death, and that the dilapidations, if estimated according to the terms stated in the declaration, would amount to 34*l.*, but if estimated according to the liability of a tenant from year to year, amounted to 5*l.* only. The learned judge overruled the defendants' objections, and directed a verdict for 34*l.*, but gave the defendants leave to move to enter a nonsuit or a verdict, or to reduce the damages for the dilapidations to 5*l.*

Hill having moved accordingly, the court refused a rule on the first point, saying, the action of assumpsit on a contract was transitory and not local: *Parke* B. adding, that the doctrine of venue applicable to covenants running with the land did not apply to that form of action (*a*), and that a main question would be, whether, in consequence of the neglect to give notice to quit, a fresh contract to let and occupy the premises must be taken to have arisen at the end of each year, as on a new demise by the plaintiff himself; it being admitted that if the original contract had been for a fixed period, and the executors had then entered, the case would have been different. On the last point the court held, that it was for the defendants to show that the plaintiff was only the cestui que trust, as contracting for the

(a) See *Thursby* v. *Plant*, 1 Wms. Saund. 240 a. n. (b) (o), *Stevenson* v. *Lambard*, 2 East, 580; *Nation* v. *Tozer*, *ante*, Vol. IV. 561.

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benefit of another, whereas nothing on the evidenc proved that the legal estate was not in the plaintifl but they granted a rule on the second point as to th stamp, and on the third point in reduction of damage

Adams Serjt. (with him *J. J. Williams*) showe cause. First, as to the stamps; if the agreement stam of 15*s.* was not itself sufficient, the lease stamp of 1*l* which was impressed on the document just before th trial, being the amount of a lease stamp under 55 *Ge* 3. c. 184. was. It will be argued that as by 44 *Geo.* 3 c. 98., the stamp act in force in 1805, the proper amoun of stamp duty on a lease was 1*l.* 10*s.*, the stamp of 1 is insufficient, because the stamp required to be put o an instrument must be taken to be that which is th legal stamp at the time it was executed. But the stam office could only impose the stamp duty in force at th time they affixed the stamp; for as by 55 *Geo.* 3. c.184. it is enacted, that all previous duties shall cease an determine, the only stamp duty proper to be affixe after the passing that act must be that which was i use at the time. The commissioners were empowere to affix a stamp in the manner they did by 37 *Geo.* 3 c. 136. s. 2. which provides, that where any skin o piece of vellum or parchment, or sheet or piece o paper, on which any matter or thing, (except bills c exchange, promissory notes or other notes, drafts o orders,) shall have been engrossed, printed or writte shall be brought to the commissioners to be stamped, aft the same shall have been executed, the same not havin been stamped with any stamp, or having been stampe with a stamp of less value than is by law required, an the person or persons producing the same is desiro of having the same duly stamped, but the same canno according to the laws in force, be stamped witho payment of accumulated penalties, exceeding 10*l.*, b

sides the duty, that then and in every such case it shall and may be lawful for the said commissioners to direct the proper officers, and such officers are hereby required to stamp the same, on payment of *the duty by law payable* for such vellum, &c. in respect of the instrument, matter or thing, engrossed, printed, or written thereon, and one penalty of 10*l.* only for every such skin, &c., although the duty payable for the same shall have been imposed by more than one act of parliament, and notwithstanding the penalties thereupon may have accumulated to a larger sum than the said sum of 10*l.* The "duty by law payable" must be that so payable when the stamp is affixed to the instrument, whether the amount be greater or less than at the time of its execution. As to the objection that the instrument was not evidence, unless stamped with the particular stamp required by law at the time it was executed, *Lawrence* J. while sitting at nisi prius, overruled a similar point made in *Doe* d. *Dyke* v. *Whittingham* (*a*), and it was afterwards abandoned on a motion in the court above to set aside the verdict. It is true that in that case the new stamp duty, which had been paid, was larger than that in force at the time of the execution. The present is the only instance in which the duty existing before the act of 1815 was lowered by that act. The other ground on which the rule was granted was, that the personal contract by the defendants with the plaintiff, to hold on the terms of the original tenancy, was not proved as laid in the declaration (*b*), nor was a six months' notice to quit proved (*c*).

(*a*) 4 Taunt. R. 20. See 5 Bing. 136.

(*b*) As to such contract being in writing, see *Edge* v. *Strafford*, *ante*, Vol. I. 396.

(*c*) See *Legg* v. *Strudwick*, Salk. 414; *Birch* v. *Wright*, 1 T. R. 378; Bac. Abr. tit. Lease (L); *Denn* v. *Cartwright*, 4 East, 31; *Rex* v. *Hurstmonceux*, 7 B. & Cr. 551.

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But the entry on the premises by the defendants, who were executors of *Barber*, the original lessee, and their continuing to occupy and enjoy them after his death, made them in law tenants to the plaintiff from year to year, under a new demise on the terms of the original tenancy, as the plaintiff refrained from giving them notice to quit.

Hill and *Busby* in support of the rule. As the stamp duty payable in this case at the time of executing the deed amounted to 1*l.* 10*s.*, the revenue is clearly defrauded by the stamp now impressed of 1*l.* only. This instrument is argued to be within the relief afforded by 37 *Geo.* 3. c. 136. s. 2., as stamped with a stamp of proper denomination, though of less value than by law required. But *that* section does not enable the commissioners to stamp the instrument with the stamp "in use for the same at the time" it is "produced to be stamped," as the first does in terms. The legislature, by omitting those terms in the second section, shows an intention not to extend the same indulgence to cases included within it, as to those comprised in the first. But this case does not fall within section 1 of 37 *Geo.* 3. c. 136., for it only applies to cases where the stamp actually impressed is of a different denomination, but of an equal or greater value with that required at the time of executing the instrument, and the revenue is not injured by the mistake. Here the 1*l.* stamp is of the right denomination, but of inferior amount to that which should have been paid. For by section 1 it is provided, that if any paper, whereupon any instrument, except bills, &c., shall be written, liable in respect thereof to be stamped with a stamp of a particular denomination or value, and whereon there is or shall be impressed any stamp or stamps of a different denomination, but of an equal

or greater value with the stamp required *at the time of making, signing, or executing the instrument*, it shall be lawful for the commissioners in every such case, upon payment of *the duty by law payable* in respect of such instrument, and a penalty of 5*l.*, to cause the same to be stamped with the proper stamp *provided and in use for the same at the time* such vellum or paper shall be produced to be stamped.

Secondly, the plaintiff charges the defendants in his declaration, not as executors, who at the testator's death entered on the demised premises, and were therefore liable not as assignees of the term, but as tenants to the plaintiff in possession, by virtue of a personal contract with him, to hold the premises upon the terms contained in the lease to *Barber*. Now there is no proof that after the death of *Barber* the defendants became and were the tenants of the plaintiff, and that no notice was given them to quit, according to the terms of the agreement with *Barber*. When a tenancy is created for a year, and afterwards from year to year as long as the parties respectively please, with power to either side to determine the tenancy on giving six months' notice to quit, and the tenancy continues for some years, it must be considered as a continuance of the original taking, and not as a new demise, beginning from the expiration of each year, in which a six months' notice to quit had not been given. Thus *Buller* J. says, in *Birch* v. *Wright* (*a*), "If a tenant from year to year hold for four or five years, either he or his landlord, at the expiration of that time, may declare on the demise as having been made for such a number of years;" a passage cited by *Bayley* J. in *Rex* v. *Hurstmonceaux* (*b*), who added, "This is on the principle that it is to be considered a lease for so many

(a) 1 T. R. 380. See 4 East, 32. (b) 7 B. & Cr. 551.

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years as the party shall occupy, unless in the meantime it shall be defeated by notice on the one side or on the other." If the defendants were in possession under an expired lease to their testator, there could be no personal contract by them with the plaintiff, as alleged; for they could be only personally responsible on the ground that the whole lease had been determined and a new contract entered into by them with the defendant in express terms; but no such agreement by them to hold on the terms of the original lease is proved. Then, though they might be personally liable to the plaintiff for use and occupation, yet the plaintiff can only charge them in their representative character for the breach of any agreement contained in the original lease to *Barber*.

Lord ABINGER C. B.—This rule ought to be discharged. The objection to the stamp cannot prevail, for the different enactments of all the stamp laws ought to be construed as far as possible by the same rule. Thus, if the instrument in question had been one on which, instead of a diminished, a higher duty had been imposed since 1805, its construction must have been the same. The acute observation, that by establishing the 1*l.* stamp to be sufficient in this case, the revenue will be injured, as the legal stamp, had it been affixed in 1805, would have been 1*l.* 10*s.*, must fail, for it is the solitary instance in which such an advantage could be reaped, as in every other the duties were increased. The principle of our decision is not affected by any such exception; for by *37 Geo. 3.* the duty by law payable at the time the stamp is affixed, is the only amount, the demand of which is authorized by that act. The other objection raises a nicer point. I do not doubt the decisions which have been cited to show that when a letting from year to year continues for several

years, it may be treated or declared on as a demise originally granted for that whole term certain. In whatever way the case is put, it is quite clear that debt would lie for any rent due. The form of action in which damages are to be recovered for the not repairing, must be assumpsit against the defendants in their own right; for it is admitted they are liable de bonis propriis for their occupation of the farm after *Barber's* death. But though the form of action is confessedly correct, yet it is said that the tenancy has been improperly laid as one from year to year, and not for the whole term, according to the legal effect of the circumstances. It is however sufficient if a party in his pleading sets forth his case so as to found the promise he alleges to be made by the defendants, and the court will decide on the legal effect produced. Nor do I see how a declaration otherwise framed could have been supported by the facts in evidence. It states a demise, which is to continue from year to year, unless determined by notice to quit; and then avers that no such notice was given, and that the occupation was continued: two facts sufficient to raise the implied promise of the defendants afterwards alleged, viz. that the defendants consented to occupy on the terms of the original lease. The promise laid in the declaration appears to me supported by the evidence, and this rule must therefore be discharged.

PARKE B.—I can add nothing to what has been already said on the subject of the stamp, except that the same words "the duty by law payable," are found in both the sections of 37 *Geo.* 3. c. 136. which have been cited. Now all the duties imposed by former acts are repealed by 55 *Geo.* 3. c. 184., so that they can no longer be duties "by law payable" at the time the commissioners are called on to affix the stamp.

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The other is a point of some importance, but not involved in doubt. The declaration states all the facts correctly, and the promise alleged to have been made by the defendants is, that in consideration of the plaintiff permitting them to continue in possession of the premises, and omitting to give notice according to the terms of the agreement, they would perform it in all things to be performed on the part of the original tenant *Barber*. The only question is, whether this is a promise which is to be implied by law? I am of opinion that it is, and that the implication necessarily arises from the situation of the parties. Were it held otherwise, great inconvenience would arise, as this sort of occupation is of very ordinary occurrence. The nature of the demise is this, that the lessee shall hold for one year, and so from year to year as long as both parties please, subject to a mode of notifying the dissent of either by giving the other a notice to quit. Suppose land so let to descend to the heir at law of the lessor, who does not, by giving a notice to quit, exercise his power to dissent from the continuance of the tenancy, the tenancy will continue. So if a new party comes into possession as assignee of the original tenant, and the landlord gives him no notice to quit, the assignee becomes tenant on the same terms as his predecessor. If the law did not imply that to be the contract, the consequence would be, that in such cases no action could be supported for any breach of the original terms of demise, *e. g.* in neglecting repairs, or for particular modes of farming, &c., unless it was brought by the executors of the original landlord against the representatives of the original lessor. That would be most inconvenient, and perhaps impracticable, after a lapse of several years; for it is clear that the statute 32 *Hen.* 8. c. 34. only applies to tenants under leases by indenture. Then it seems better to hold that the

relation of landlord and tenant is to be implied from the situation of the parties, where the person entitled to the reversion, as representing the original lessor, omits to give a notice to quit to the tenants in possession, and their occupation continues in consequence.

BOLLAND and GURNEY Bs. concurred.

Rule discharged.

PREEDY *against* M'FARLANE.

The plaintiff arrested the defendant for 27*l.*, and the jury would have given a verdict for 28*l.*, but for the omission of a count applicable to 8*l.*, part of the plaintiff's demand, on discovering which their verdict was reduced to 20*l.*:—Held, that the defendant was not arrested without reasonable or probable cause, so as to be entitled to costs, under 43 *Geo.* 3. c. 46. s. 3.

Where the arrest was for 27*l.*, the sum named in the affidavit of debt, but the capias was indorsed by mistake for 37*l.*:—Held, that the defendant was not on that account entitled to such costs.

A defendant who is arrested and does not give bail, but goes to prison, is within the words "assent and hold to bail" in 43 *Geo.* 3. c. 46. s. 3.

RULE to show cause why the defendant should not have his costs under 43 *Geo.* 3. c. 46. s. 3. The plaintiff's claim was for 27*l.*, for attendance by the plaintiff as a surgeon, and for board and lodging, but there was no count applicable to the latter demand. The writ being by mistake indorsed for bail for 37*l.*, the defendant was arrested for that sum. He gave no bail, and went to gaol. The verdict was for 28*l.*, but on account of the want of a count applicable to board and lodging, the jury, by direction of the learned baron, deducted that amount from the verdict, which was ultimately given for 20*l.* only. The affidavits used in answer to the rule stated that before the arrest took place, the sheriff's officer pointed out to the plaintiff the mistake in the indorsement; on which the plaintiff said he was not to arrest for more than 27*l.*, and that

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the officer had afterwards told the defendant that he was to give bail for 27*l.* only.

Jervis showed cause. It was owing to a mere omission in the declaration that the verdict was taken for less sum than 28*l.* Then there was reasonable and probable cause for arresting him for that sum.

Price contrà. The officer does not swear that I told the defendant he was to give bail for 27*l.* only. The præcipe was for 37*l.*, and may be referred to the files of the Court. [*Parke* B. You cannot use as it is not verified by affidavit.] The 43 *Geo.* 3. applies to "all actions in which the defendant or defendants shall be arrested and held to special bail." Imprisonment is holding to bail within those words. The verdict shows the amount due, for which alone the arrest should have taken place.

On *Price's* referring to the particulars of demand annexed to the record, the Court rejected them, as they were not verified on affidavit.

Lord ABINGER C. B.—This rule must be discharged. I agree that if a defendant is arrested and sent to prison, it is an arrest and "holding to bail," viz. a holding him to give bail, which entitles him to the benefit of the statute. On the other point, it has long been the settled practice of *Westminster Hall*, that the court will consider the whole circumstances of the case, to discover whether the arrest of the party was improper or whether there was reasonable or probable cause for it. Now, on the whole facts of this case, it appears that the defendant was not, in fact, arrested for more than 27*l.*, and that, though the verdict was for less, that was occasioned by a mistake in the declaration; for the

jury were ready to find a verdict for a larger sum, 28*l.* The defendant was therefore not arrested for 27*l.* without reasonable or probable cause.

The other Barons concurred.

Rule discharged with costs, which are costs in the cause. (*a*)

(*a*) See *Rowe* v. *Rhodes*, *ante*, Vol. IV. 216; *Summers* v. *Grosvenor*, *id.* 222; *Bates* v. *Pilling*, *id.* 231.

BYRN *against* DIBDIN, Clerk.

A king's chaplain is a servant in ordinary with fee, and as such privileged from arrest.

RULE to show cause why the bail-bond given by the defendant should not be delivered up to be cancelled, on the ground that the defendant was privileged from arrest. His affidavit verified his appointment as one of the king's chaplains, at an annual salary, and stated that as such he was liable to be called on at any time to do duty at *St. James's* chapel. The plaintiff's affidavits stated the plaintiff's belief, that the defendant had only acted once as chaplain since his appointment two years and a half ago, and that the arrest took place at his rectory in *Suffolk*.

Busby showed cause. A distinction is drawn for the purposes of this motion between those who are in actual daily attendance on the king, and others who may only be called on to attend him occasionally. This defendant claims generally, in right of his office, as king's chaplain, to be privileged at all times, and not only when in attendance on his Majesty. Thus a tradesman, in the *Strand*, who had been appointed king's

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coachman in ordinary, was discharged from arrest because his employment was not colourable but real, *King* v. *Foster* (a), and the privilege was the king's, who might otherwise be inconvenienced by the party's arrest while in attendance on him. But it has been repeatedly held, that if the alleged privilege from arrest is not clearly established by the defendant, the court will leave the defendant to his writ of privilege; *Leslie* v. *Disney* (b), *Whittingham* v. *De La Rieu* (c). So in *Luntley* v. *Battine* (d), *Abbott* C. J. says, "As there is no great necessity for the service of these officers (gentlemen of the privy chamber), the occasions being so rare when they are called upon, and when they occur not requiring the attendance of them all, I do not think that any inconvenience will result to his majesty's service, by our leaving the defendant to sue out his writ of privilege, in order that the point may be solemnly determined upon record. Besides, the defendant is bound to show that at the time of the arrest he was actually in attendance on the king by his command, or that he was going to or returning from such attendance," *Batson* v. *M'Lean* (e). Now, as the defendant, when arrested in *Suffolk*, was not in such actual attendance on the king, but residing on his living, pursuant to 57 *Geo.* 3. c. 99., he cannot be said to be privileged at that time and place.

The Court stopped *Bompas* from supporting the rule.

Lord ABINGER C. B.—The onus was on the defendant to show that he was the ordinary servant of the king, and liable to be called on to perform services at his pleasure. That is here shown; for a king's chap-

(a) 2 Taunt. 167; 2 Keble, 3; and 1 *id.* 137; 3 Inst. 631; 4 Inst. 9[illegible]
(b) *Ante*, 181, and the cases there cited.
(c) 2 Chitt. Rep. 53.
(d) 2 B. & Ald. 254.
(e) 2 Chitt. Rep. 48.

him is so liable, and if he could be arrested, the king might be deprived of his services. *Somerset* herald, in *Leslie* v. *Disney*, was not of the king's household, but a public officer.

PARKE B.—In *Leslie* v. *Disney*, and *Luntley* v. *Battine*, the defendants were not the king's servants in ordinary with fee, but a chaplain is. Nothing in 57 *Geo.* 3. c. 99. prevents a chaplain from attending his Majesty when he pleases to summon him. The plaintiff may apply to the Board of Green Cloth for leave to arrest the defendant, if he is not wanted as a chaplain.

The other Barons concurred.

Rule absolute.

OWENS *against* DENTON.

ASSUMPSIT for wages. Pleas, non assumpsit; and set-off for malt sold and delivered to plaintiff. At the trial before *Vaughan* B. at the last *Derbyshire* assizes, the defendant proved his set-off, but on cross-examination it appeared that the sale was by the hobbett and not by the legal bushel; nor was the proportion which the hobbett bears to the standard measure specified in the special agreement to sell by the hobbett, as provided by 5 *Geo.* 4. c. 74. s. 15. The defendant then proved an account to have been settled between him and the plaintiff, which included the malt. The verdict being for the plaintiff, notwith-

Malt was sold by defendant to plaintiff, by a measure called a *hobbett*, being a measure established by local custom, without specifying the proportion which that measure bore to the standard, as directed by 5 *Geo.* 4. c. 74. s.15. The parties afterwards settled their accounts, and inter alia, as to the malt. Held, in an action by the plaintiff against the defendant for wages, the defendant might prove that settlement of accounts as a payment of the plaintiff's demand.

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standing the judge's direction to the contrary, a rule fo a new trial was obtained, against which

J. Jervis showed cause. As the sale of the malt is th ground of set-off, it must be proved by the defenda to have been as legally made as if he had brought a action to recover the price of it when sold. Now, a sales by measures not agreeable to 5 *Geo.* 4. c. 74., a amended by 6th *Geo.* 4. c. 12., are illegal (*a*), an cannot be enforced; *Law* v. *Hodson* (*b*), *Little* v. *Poole* (*c*), *Tyson* v. *Thomas* (*d*). [Lord *Abinger* C. B. If the plaintiff had paid the defendant for the ma sold by the hobbett, he could not have recover the money on the ground of the contract being voi Then is not the settlement of accounts between the equivalent to a payment? (*e*)] It has never been he that such a settlement would legalize the contra The giving a bill of exchange in part for spiritu liquors sold in less quantities than 20*s.* at a time, agai 24 *Geo.* 2. c. 40. s. 12. is void, *Scott* v. *Gilmore* (though it is a strong settlement of account.

Atcherley Serjt. and *Welsby* contrà; stopped by court.

Lord ABINGER C. B.—The general proposition

(*a*) Section 15., after enacting that all contracts, sales &c., of th to be sold or delivered by weight or measure, where no special agreem shall be made to the contrary, shall be taken to be made and had accord to the standard weights and measures ascertained by that act, provides th "in all cases where any special agreement shall be made with reference any weight or measure established by local custom, the ratio or proport which every such local weight or measure shall bear to any of the st standard weights or measures, *shall be* expressed, declared and *specified such agreement, or otherwise such agreement shall be null and void.*"

(*b*) 11 East, 300; a case on stat. 22 *Car.* 2. c. 8. s. 2.

(*c*) 9 B. & Cr. 192. (*d*) Maclell. & Y. 119.

(*e*) See 4 Bing. 15; 4 B. & C. 281, *Skyring* v. *Greenwood.*

(*f*) 3 Taunt. 226. See 1 D. & R. 559; 3 Campb. 12; and *Watt* v. *Friend*, 2 Chitty's Statutes, 1107.

be admitted, that a seller cannot enforce a contract of this sort by action, or in support of a plea of set-off; but the question here is, whether a settlement of accounts equivalent to a payment of cash has not taken place between these parties. I think that there must be a new trial.

PARKE, BOLLAND and GURNEY Bs. concurred.

Rule absolute for a new trial.

JONES *against* WATERS.

A custom within a borough and corporate town, that the town-crier, appointed by the bailiff thereof for the time being, who during his office is lord of the manor, shall have the exclusive right to proclaim by sound of bell, the sale of all goods brought within the borough to be sold by auction there, is a legal custom.

CASE for disturbance of office. The declaration stated, that the borough of *Brecon* otherwise *Brecknock*, is an ancient borough, and the burgesses thereof have been a body politic and corporate, and for divers years have been such body politic and corporate, by the name of the bailiff, aldermen, and burgesses of the borough of *Brecon*, to wit, in the county of *Brecknock*.

That the bailiff of the said borough for the time being, for divers years before the committing of the grievances by the said defendant hereafter mentioned, hath been, and of right ought to have been, and still ought to be, and is the lord of the manor of the said borough and the town of *Llywell*, to wit, in the county of *Brecknock*. That also, for all the time aforesaid, the said bailiff of the said borough for the time being, so being lord of the manor of the said borough and town of *Llywell*, hath been used and accustomed to appoint, and of right ought to have appointed, and still ought to appoint such person, as to him the said bailiff hath seemed fitting, to the office of town-crier of the said

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borough and town of *Llywell*, to wit, in the county aforesaid.

That heretofore, to wit, on the 1st day of *May*, in the year of our Lord 1833, at &c. *Launcelot Morgan* esq. then and there being bailiff of the said borough, and lord of the manor of the said borough and town of *Llywell*, under his hand and seal, duly nominated and appointed the said plaintiff to the said office of town-crier of the said borough and town of *Llywell*, to have and to hold the said office of town-crier to him the said plaintiff for and during the term of three years; and for the execution of the said office, then and there gave and granted unto the said plaintiff all and every the fees, profits, and perquisites belonging to the said office of town-crier, within the said borough and town of *Llywell*. That by reason of the premises, the said plaintiff, before and at the time of the committing of the grievances by the said defendant hereinafter mentioned, was possessed of the said office of town-crier for the term last aforesaid, to wit, in the county aforesaid, and that office for a long space of time, to wit, one month next following the said appointment and grant, well and truly had, exercised, and the wages, fees and profits belonging to the aforesaid office of town-crier for that time had and received, to wit, in the county aforesaid: Yet the said defendant, contriving and intending to injure the said plaintiff, and to disturb him in the exercise of the said office of town-crier, and to deprive the said plaintiff of the wages, fees and profits belonging to the said office of town-crier as aforesaid, and while the said plaintiff was so possessed of the said office of town-crier as aforesaid, to wit, on the 1st day of *June*, in the year of our Lord 1833, and on divers other days and times between that day and the commencement of this suit at &c., of his own wrong, and without any

right or lawful authority, exercised the said office of town-crier, and received and took divers fees and profits belonging to the said office of town-crier within the said borough and town of *Llywell*, and then and there thereby hindered and disturbed the said plaintiff in and from exercising his said office of town-crier within the said borough and town of *Llywell*, and prevented him from receiving the said last-mentioned fees and profits belonging to his said office of town-crier as aforesaid. In several other counts, the plaintiff claimed as for disturbance of and in right of his office. Plea, general issue. The action was commenced before the new rules of pleading began to operate.

The cause was tried before *Parke* B. at the last summer assizes for *Brecknockshire*. The corporate name was proved, and the corporation was admitted to be by prescription. It was proved, that during all living memory there had existed within the borough of *Brecon* an office of town-crier or bellman, the appointment to which, in cases of vacancy, was exercised by the bailiff for the time being, as lord of the manor of *Llywell*, by virtue of his office at the court leet. His duty was to carry the corporation mace before them on particular occasions, wearing a particular livery furnished him by them; also to make proclamation by sound of a bell, delivered to him by them on his appointment, of various matters, including sales of goods about to be sold by auction within the limits of the borough. The corporation paid him one shilling for every proclamation made by him for them, and for proclaiming meetings for letting the turnpike tolls he had two shillings. An auctioneer was called to prove that he had employed the plaintiff, on all occasions of sales by auction, to proclaim them by bell, but no fixed fee appeared to have been paid by him to the plaintiff for so doing within

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the borough, though it was shown that no one else had proclaimed them besides the regularly appointed town-crier, except one *Voss*, who had discontinued doing so on the plaintiff's threatening to proceed against him. The plaintiff's possession of his office and acting in it were proved, and it was shown that the defendant had acted as crier of sales within the borough. The defendant produced no evidence, but his counsel urged, that there was no evidence for the jury that the office was an ancient one, which had existed from time immemorial, or that the plaintiff had the exclusive right of proclaiming by bell, sales by auction to take place within the borough; but the learned baron being of a contrary opinion, the case went to the jury, who gave a verdict for the plaintiff for 1*s*. damages, the defendant having leave to move to enter a nonsuit, if this court should be of opinion that the office of town-crier, as claimed within the borough, could not legally exist therein by prescription, as found by the jury, or that the right claimed by the plaintiff to exclude all others from proclaiming sales by bell within the borough was bad in law. A rule having been obtained accordingly in last term,

Maule, *E. V. Williams* and *Powell* now showed cause. First, can the office of town-crier of *Brecon* legally exist, as claimed in the declaration? Its actual existence from time immemorial is found by the verdict. That it has existed without interruption during so long a period, is a strong proof that it is not inconvenient or unreasonable, though its origin may be referred to customs and a state of things which have now ceased. In *The King* v. *The Inhabitants of St. Nicholas, Hereford* (*a*), it was held to be a public

(*a*) 10 B. & C. 831.

annual office, within the statute of 3 *Will. & Mary*, c. 11. *Hill* v. *Hawkes* (*a*) shows that the bailiffs of *Litchfield* had been accustomed from time immemorial to appoint a person to the office of bellman. The next question is, whether a prescriptive right of excluding all persons but the plaintiff himself from proclaiming by the bell, within the borough, the sale of goods by auction, is legal. The plaintiff is not obliged to show the origin or grounds of the custom. It is sufficient that in its origin it might be reasonable, *e.g.* for preventing a contest of noises in a town: and unless a legal commencement of the immemorial custom was impossible, it will be presumed; *Drake* v. *Wigleswerth* (*b*), *Cocksedge* v. *Fanshaw* (*c*). [*Parke* B. You contend that, independent of ancient usage, a bye-law to the effect of the custom in question would be good, *Player* v. *Jones* (*d*).] Yes, but this case is strengthened by the usage found. In *Bacon's Abridgment*, tit. *Officer* (A.), numerous cases are cited in which customs like the present have been established, though objected to as being in restraint of trade, and therefore illegal. [*Parke* B. As an equivalent for the monopoly of the town-crier, that portion of the public who sell by auction within the borough of *Brecon*, has a man ready with a bell to announce their sales, who might be compelled to do so.] In *Player* v. *Jones*, a bye-law restraining the number of carts in the city of *London* was held to be good. So in *Fazakerly* v. *Wiltshire* (*e*), a custom in the city of *London* that none but free porters should carry corn &c. was sustained. The chief justice there says, "A custom to restrain

(*a*) Moore, 835; Roll. Ab. Customs, (G.)

(*b*) Willes, 666. (*c*) 1 Doug. 132.

(*d*) 1 Ventris, 21; 1 Sid. 284, nomine *Player* v. *Jenkins*. See March, 15, pl. 34.

(*e*) 1 Stra. 462; 10 Mod. 338, S. C.

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trade in a particular place is good, and surely much more so where the restraint is only from bodily labour in one instance, than where it prevents a man from exercising an art he has been long in learning. I think the custom is good, as it is a convenience to the public, and as there is an equivalent by the obligation the city is under to provide porters. If they do not, I am of opinion that an action will lie as in the common case of a ferry." Mr. Justice *Fortescue* added, "If this was an inconvenient custom, it would have been complained of before so long an enjoyment," viz. not immemorial, as in this case, but only from 18 *James* 1. to 17 *Geo.* 1. In *Bosworth* v. *Hearne* (*a*), a bye-law that no drayman or brewer's servant should be abroad in the streets with his cart or dray at certain periods, was held good, appearing to be founded on a custom in the city for the regulation of carts. The court there said it was enough if the bye-law did not appear unreasonable in itself. Again, in *Bradnox's* case (*b*), the court said, that it had often been resolved that custom may create a monopoly, as in the case in the *Register* (*c*), where the custom was, that none should exercise the trade of a dyer in *Ripon*, without the Archbishop of *York*'s licence. This is more a custom of internal regulation of a town, than excluding foreigners from trading there. Customs that the servants and inhabitants of a certain district shall grind their corn at a certain mill, or bake their bread at a certain bakehouse, have been repeatedly recognised as legal. In *Moseley* v. *Walker* (*d*) the exclusive right of the plaintiff as lord of the manor of *Manchester* to exclude all persons from selling in their own houses all such commodities as were usually sold in the market,

(*a*) 2 Strange, 1085; R. temp. Hardwicke, 405; Andr. 91, *S. C.*
(*b*) 1 Ventris, 195. (*c*) Reg. Br. 186. (*d*) 7 B. & C. 40.

was established. It has even been held to be a good custom for all the householders and occupiers of dwelling-houses in the parish of *A.* to grind at the plaintiff's mill all their corn used by them within the parish, although they are not tenants (*a*). The office of ringer of hogs turned on a parish common has been considered legal, though excluding the owners from performing that office after turning them on (*b*). This custom, if unreasonable, might have been long ago questioned.

John Evans and *James* (Sir *W. Follett*, Solicitor-General, with them) in support of the rule. Before answering the argument on the two questions reserved by the judge, a preliminary question arises, viz. whether in fact any office whatever, in the legal meaning of the term, was proved to have existed. For as in every count in the declaration the plaintiff claims in respect of an office, he cannot succeed unless he proves that a legal office existed. Now, though the plaintiff was shown to have exercised the employment of bellman, a mere employment and an office are clearly distinct in law. In *Field* v. *Boethsby* (*c*), *Glynn* C. J. puts the difference in these words: "Mes pur explaner mon diversity inter un office et un employment, jeo die, que comment chescun office soit un employment, uncore e converso, chescun employment n'est un office; come si jeo grant al un pur make mon hay, ou pur arer mon terre, ou pur heard mon flock, ceux sont employments, et differ del esteant steward de mon manor, &c. queux sont offices." In *Ripon* v. *Streater* (*d*) the validity of

(a) *Higgs* v. *Gardener*, 1 Roll. Ab. 559, pl. 4; 2 Saund. 117, n. See *Richardson* v. *Walker*, 2 B. & C. 827.

(b) *Rex* v. *Whittlesea*, 4 T. R. 807. (c) 2 Sid. 240.

(d) Bac. Abr. tits. Prerogative, and Grant; vol. 5. p. 595, 6 edit.; Skin. 234; 2 Show. 260; 10 Mod. 106. Also Bac. Abr. Office (A), citing *Burrell's*

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the king's patent for the exclusive printing of law books was in question, and the House of Lords held, that it was not the grant of an office, but rather of an employment. In *Lee* v. *Drake* (*a*), the plaintiff declared for disturbance in his office of parish clerk, and it was objected, that it was rather a service or employment than an office, but no decision appears. *Boyter* v. *Dodsworth* (*b*) established that an action for money had and received would not lie to recover the perquisites of an office, unless such perquisites were known and accustomed fees; and Lord *Kenyon* said, "If there had been costs and fees annexed to the discharge of certain duties belonging to the office, and the defendant had received them, an assize would have lain. On the whole, it is apparent that to constitute an office in law, certain duties and fees must be attached to it. Now, no fixed payment was here proved. But if this be an office and not a mere employment, the custom attempted to be supported is illegal, as being not merely in regulation but in restraint of trade; for it claims the exclusive right to proclaim all sales by auction in the borough of *Brecon*, and prevents strangers bringing goods there from other places, for sale by auction, from proclaiming such auction in as full and public a manner as they might otherwise do. Now, the decisions relied on to prove that bye-laws, as well as customs, restraining trade to particular persons may be good, merely show that they may be so far valid as they regulate it for its general convenience and benefit (*c*). Of this nature are the cases as to limiting the number of carts and free por-

case, Carthew, 478; *S. C.* 5 Mod. 431; *Rex* v. *Kemp*, Carth. 352, 14 *R.* 2. c. 10. Vin. Ab. tit. Office, (B).

(*a*) 2 Salk. 468. (*b*) 6 T. R. 681.

(*c*) See *Harrison* v. *Goodman*, 1 Burr. 12; *Clarke* v. *Le Creu*, 9 B. & C. 58.

ters in *London*. [*Parke* B. Bye-laws or regulations, if made in pursuance of ancient custom, are good, even in restraint of trade (*a*), and may be made for the regulation of trade in particular places, without any custom for that purpose. Bye-laws of the former kind exist in many places, particularly in *London* and *York*. When their legality was questioned in *York*, they were held good in *Mayor of York* v. *Welbank* (*b*).] In that case the monopoly established was not in favour of one person only, but of all the freemen of *York*, their widows or partners in trade. Again, in *London*, besides that their customs are confirmed by act of parliament (*c*), so many guilds or companies exist there, each having numerous members, that the public interest is not injured by the fact that persons trading there must become free of some one of them. [*Parke* B. There are no guilds in *York*, yet the bye-law was established.] The argument submitted is, that in *York* and *London* a number of privileged persons exist sufficient to carry on the trade of those cities to any extent to which it can, in all probability, be carried. But should the plaintiff become incapable of performing the office, the public is without remedy. Nor in the cases cited were any others bound but inhabitants and resiants, whereas this claim affects strangers. [*Parke* B. Only such persons as come to the borough in order to have their goods sold by auction, and wish to announce that sale by bell.] *Player* v. *Jones*, and *Fazakerly* v. *Wiltshire*, were cases in which the number of carts and free-porters was regulated to prevent

(*a*) See cases in last note. Also *Rex* v. *Harrison*, 3 Burr. 1322; *Clarke* v. *Compton*, 7 D. & R. 597.

(*b*) 4 B. & Ald. 438.

(*c*) Lord Raym. 1130. See 8 Rep. 126; Cro. Car. 347; Hard. 303; 7 *H.* 4. c. 9.; 9 *H.* 4.; 4 Inst. 249; 8 Rep. 128.

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nuisances, *Fortescue* J. saying, in the latter cas "The case of carts was allowed to prevent nuisance and we may put this upon the same foot;" th same principle may be traced in *Bosworth* v. *Herne* (a Lord *Hardwicke* there says, "Where the subjec matter of a bye-law is the prevention of nuisance the consideration must be upon the convenience i general, taking in the crown, the party, and th people;" and the report in *Strange* (*b*) rests th decision on the ground of its being a regulation c trade. The cases of mills and bakehouses turn upo the relation between lord and tenant. Thus the *Arch bishop of York*'s right was established, ratione domin et tenuræ (*c*). In Sir *George Farmer* v. *Brooke* (*d*) th plaintiff declared, that by custom he and his ancestor had a bakehouse in the town of *B.* to bake whit bread and household bread, and that he had served a the town with bread, and that no other could use th trade without his licence, and that the defendant ha used the trade without his licence, but it was ad judged that the action did not lie. "God forbid," i was said, "that bread, and the baking of it, should b confined to any special person, especially in a market town." [*Parke* B. One class of those cases only in cludes tenants of a certain district, but the soke cases (c included all inhabitants.]

The custom is also bad, as being unreasonable. I is bad, first, because there is no consideration. I *Hill* v. *Hawkes* (*f*) a consideration existed for the re striction, the bellman being bound to keep the marke

(*a*) Cas. temp. Hard. 408.

(*b*) 2 Strange, 1087.

(*c*) See Owen, 67.

(*d*) Owen, 67; 1 Leon. 142; Cro. Eliz. 203, 208; 8 Co. 125 b. *S. C* The judgments in this case are differently reported.

(*e*) *Richardson* v. *Walker*, 2 B. & Cr. 827; *Richardson* v. *Capes*, 2 B. & Cr. 841.

(*f*) Moo. 835.

clean. Again, it is unreasonable on account of uncertainty, for no duties are defined as belonging to the office, or any certain fees as payable to the officer. What duty is the plaintiff bound to execute? [*Parke* B. If the plaintiff has a monopoly of proclaiming sales by auction, by bell and outcry, he would be compellable to do so when required; for it is clear that his duty must be correlative with such his exclusive right.] How often is he to make proclamation? at what hours and in what places? Would proclamation by the sound of a trumpet, rattle, drum, or voice, be intrusion on his office? or may intended sales by auction be made known by the exhibition of a placard, or sending circulars? It is also left quite uncertain what fee the officer is to receive (*a*), or whether he may refuse to proclaim a sale until his demand, whatever it may be, is paid. The custom is also bad for inconvenience. Suppose the town-crier to be unfit for his office from age, illness, or weakness of voice, or even if he wilfully refuses to perform his duty, how can he be removed (*b*)? It is also inconvenient in not making provision for any changes induced by time and the altered circumstances of society. For had *Brecon* become as considerable as *Manchester*, still the plaintiff must have enjoyed the monopoly of advertizing sales, and others could not have exercised that function. There are no precedents of such an action as this. [*Parke* B. The rarity of such actions may be explained in this way. These rights are in general invested in a class of persons, all of whom, as in the case of the *Dippers of Tunbridge Wells* (*c*), being jointly interested in any in-

(a) See *Boyter* v. *Dodsworth*, 6 T. R. 681.

(b) In *Fazakerly* v. *Wiltshire*, 1 Str. 468, the chief justice says, the merchant is not obliged to rely on an action only, for he certainly may employ whom he pleases, if the free-porters do not attend.

(c) 2 Wils. 414.

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trusion upon them, must agree to join in an action, which would in such cases be often difficult.] Every count states the plaintiff to be disturbed in his office, that office being in respect of the duties he has to do as town-crier; but the declaration should have stated, that by custom certain rights were annexed to the office, and that the defendant had deprived the plaintiff of them. [Lord *Abinger* C. B. The case has been extremely well argued on both sides.]

Cur. adv. vult.

Lord ABINGER C. B. now delivered the judgment of the Court.—This is an action in which the bellman of *Brecon* seeks to enforce an exclusive privilege claimed by him, to proclaim by sound of bell all sales of goods by auction which take place within the borough of *Brecon*. The declaration states, that the plaintiff was possessed of the office of town-crier, and that the defendant disturbed him in that possession. The particular duties of the office were matter of evidence; evidence was given on that subject, and the jury found accordingly, that it was the exclusive privilege of the town-crier, appointed by the corporation, to make public proclamation of sales by auction by bell, and that the defendant had infringed that privilege. The only point, therefore, for us to decide is, whether the custom relied on by the plaintiff is good in law, for no objection is taken to the evidence upon which the verdict proceeded. After considering the very full and able arguments which have been urged on both sides, it appears to us that there are no legal grounds upon which we can say that such a custom must be bad. It may have had a good commencement, and as it probably existed long before the art of printing was known, must have

been formerly a much greater benefit to the public than at present. We see no reason to prevent the corporation of *Brecon* from appointing a town-crier, or for taking from the plaintiff the benefit of the verdict. We cannot affirm that a custom conferring on him the exclusive privilege of proclaiming by sound of bell all sales by auction, about to take place within the borough, is bad in law.

Rule discharged.

TAYLOR *against* HILARY.

The declaration stated that the defendant guaranteed the payment of goods furnished by plaintiff to *H.* at the defendant's request. Plea, that before breach of that undertaking, it was agreed between plaintiff and defendant, that plaintiff should supply goods to *H.*, and that they should be paid for at the end of three months by a joint bill at four months to be accepted by the defendant; which agreement of defendant, plaintiff, before breach of the former undertaking declared on, accepted in full discharge of such former agreement, and released the defendant from performing it:—Held, on demurrer, that the second agreement did not require to be in writing, pursuant to 29 *Car.* 2. c. 3. being a provision by which the defendant became absolutely bound as an original debtor; and not being an accord and satisfaction, but a substituted contract, afforded a good defence to the action without alleging performance.

ASSUMPSIT. The declaration stated, that in consideration that the plaintiff, at the special instance and request of the defendant, would allow one *Holt* to have goods as he might want them, not exceeding in the whole 200*l.*: the defendant undertook and promised the plaintiff to guarantee the payment of such goods. Averment, that the plaintiff confiding &c. did afterwards, to wit &c. sell and deliver to *Holt* certain goods of great value, not exceeding in the whole 200*l.*, to wit, of the value of 190*l.*, as he the said *Holt* did want them, of which the defendant afterwards, to wit, on &c. had notice. The breach was, that *Holt* had not paid for the said goods or any part thereof, nor had the defendant, although often requested, paid for the same or any part thereof. Plea, that after the making

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of the promise and undertaking in that cou tioned, and before any breach thereof, to wit day and year aforesaid, it was, at the plaintiff' instance and request, agreed by and betw plaintiff and defendant that the plaintiff shoul to the said *Holt* 200*l.* worth of goods as he want them, and that such goods should be pai the end of three months by a joint bill at four accepted by the defendant; which agreement defendant he the plaintiff, before any breach promise and undertaking in the said count me accepted in full discharge of that promise and taking, and thereby then wholly released charged the defendant from the further perf of that provision and undertaking; concludin verification. Demurrer to the plea, alleging f that there was no material difference betw agreement set out in the count and that set ou plea, and that the only difference applied to th credit to be given; and that it did not appear said plea but that the agreement therein m had been fully carried into effect by the plain the time of credit had expired.

Barstow supported the demurrer. The me grafting on the original agreement a new ti mode of payment does not establish any differe tween the contract in the declaration and tha in the plea. [*Parke* B. By the contract in th ration the plaintiff only undertook to guaran payment for the goods, *i. e.* by *Holt;* whereas t tract in the plea is, that at the end of three mo should give a bill himself at four months; t makes himself absolutely responsible at the end time. The agreements therefore substantially The defendant was to accept a bill, and procu

other to accept it also.] The second agreement is not available by the defendant, because it is not pleaded to be in writing, and signed, pursuant to the statute of frauds, *Case* v. *Barber* (a). [*Parke* B. If the second agreement was only an undertaking for the default of another, that argument would be well founded; but the defendant bound himself as an original debtor.] The plea is bad, for not showing that the time of credit given by the second agreement still continues. Where goods are sold on a credit which has expired, the plaintiff may sue in indebitatus assumpsit for goods sold (b); but a defence that the credit has not expired must be specially pleaded since the new rules; *Edmunds* v. *Harris* (c). [*Parke* B. That case has been doubted. If on non-assumpsit pleaded it should turn out that the goods were to be paid for at the end of three months by a bill at four months (d), the contract declared on, which is to pay for them on request, would not be proved. Had the credit expired, that count would be supported by evidence of a contract to pay for them at the stated time of credit.] The two agreements only differ in the time and mode of payment. He concluded by asking leave to amend, if the court was against him.

Lord ABINGER C. B.—The plea in fact states, that before the breach of the first agreement it was abandoned, and a new one was entered into, varying from the old one in an essential respect, viz. the time of payment.

PARKE B.—The second agreement having been sub-

(a) Sir Thomas Raym. 450. second resolution.

(b) 1 N. R. 330; 3 B. & P. 582; 9 East, 498; 4 East, 75. 147; 12 East, 1.; 2 B. & A. 755.

(c) 6 C. & P. 547; 4 N. & M. 182. S. C.

(d) Mason v. *Price and Another*, 4 East, 147.

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stituted for the first, as might be done before breach of it, the remedy was only on the second. As a plea is not one of accord and satisfaction, it does require an averment of performance.

Crowder was to have supported the plea.
Barstow had leave to amend.

NOEL *against* ISAAC and Others.

Where an attorney is arrested and held to bail by a person who is cognizant of his privilege, trespass is not maintainable.

TRESPASS by an attorney for arresting and imprisoning him, whereby he was obliged to find bail. Plea, justifying under a capias in an action by *Isaac and Others* v. *Noel*. Replication, that before and at the time of suing out and execution of the capias therein mentioned, he was an attorney of the court of our lord the king before the king himself at *Westminster*, and had obtained and entered his certificate to practise, and was, by virtue thereof, practising as an attorney therein, whereof the defendants during all the time aforesaid, omitting "had notice," by mistake in copying. Demurrer for that ground. Joinder.

Kelly for plaintiff prayed leave to amend.

[Lord *Abinger* C. B.—Can an action of trespass be sustained at all? for whether the proposed amendment would or would not be material in case, it cannot be so in trespass.] Had notice been averred, the question left unsettled in *Stokes* v. *White* (*a*) would have been brought before the court, viz. whether a party who knowing his debtor to be privileged, never

(*a*) *Ante*, Vol. IV. 786.

theless holds him to bail, is liable in trespass or in case only.

Lord ABINGER C. B.—I am clearly of opinion that an action of trespass cannot be sustained; and I much doubt whether the party has a remedy by action on the case.

PARKE B.—The privilege of an attorney from arrest should be pleaded (*a*). Mr. *Kelly* may take time to look into the books, and mention the case again if he sees fit.

It was never mentioned again.

Judgment for defendant.

R. V. Richards was to have argued for the defendant.

(*a*) See *Crossley* v. *Shaw*, 2 Bla. R. 1085.

BYASS *against* WYLIE.

Assumpsit by the drawer against the acceptor of a bill of exchange. Plea, that before the *acceptance* of the bill by the defendant it was agreed between him and the plaintiff that plaintiff should consign to *N.* certain goods, out of the proceeds of which plaintiff should direct *N.* to pay to defendant a sum equal to the amount of the bill, and that in case the proceeds should not have arrived in *England*, when the bill became due, the plaintiff should renew it. Averment, that proceeds had not arrived when the bill became due, that plaintiff declined to draw another, and that it was thereupon agreed that defendant should write to *N.* directing him to pay the whole proceeds to plaintiff—that defendant thereupon wrote such letter and delivered it to plaintiff; and lastly, that defendant had not received any consideration for the payment of the bill:—Held, that the plea was bad on special demurrer, for repugnancy in not confining the allegation of want of consideration to the non-receipt of proceeds since the letter to *Norman*.

ASSUMPSIT by drawer against acceptor of a bill of exchange for 120*l.*, bearing date the 26 *March* 1833, and payable to the plaintiff's order six months after date. Counts for goods sold, and on an account stated. Pleas: first, that there was no consideration for the defendant's acceptance, nor for payment by him. Se-

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condly, as to the first count of the declaration, that the said plaintiff ought not to have or maintain his aforesaid action thereof against the said defendant as to the said first count, because he says that before and at the time of the making of the bill of exchange and acceptance thereof by the defendant in the first count mentioned, to wit, on the day and year first aforesaid it was agreed, by and between the plaintiff and the defendant, that the said plaintiff should consign certain goods, to wit, 500 gallons of bottled porter, and 500 gallons of wine, and certain other merchandizes, in the whole of great value, to wit, of the value of 300*l.*, to one *James Norman* in certain parts beyond the seas to wit, in the *West Indies*, to be there sold and disposed of, and that the defendant should accept the said bill in the said first count mentioned, and deliver the same to the plaintiff in order that the said plaintiff might procure the same to be discounted, and receive the amount thereof to and for his own use and benefit And it was also then agreed between the plaintiff and the defendant, that a certain sum of money, to wit, the sum of 120*l.*, being a sum equal to the amount of the said bill of exchange, should be remitted and paid to the defendant out of the proceeds of the goods so consigned as aforesaid, when the same should have been sold and disposed of, in order to enable the defendant to pay the said bill when the same should have arrived at maturity, and that the plaintiff should write a letter to the said *James Norman* requesting him to remit and pay to the defendant the said sum of 120*l.* being the amount of the said bill of exchange, for the purpose of paying the said bill when it should have arrived at maturity; and it was also then agreed between the plaintiff and defendant, that in case the said goods should not have been sold and disposed of, and the proceeds of the said sale should not have arrived i

England at the time when the said bill should have become payable, that then the said bill should be renewed, and the said defendant should in lieu thereof accept another bill, to be drawn upon him, payable at a future time, in order that the said defendant might not be called upon to pay the amount of the said bill before the said goods should have been so sold and disposed of, and a sufficient sum to satisfy the amount of the said bill should have been paid to or come into the hands of the defendant, out of the proceeds of the said sale. And the defendant further saith, that in pursuance of the said agreement so made as aforesaid, the said plaintiff did afterwards, to wit, on the day and year first aforesaid, consign the said goods to the said *James Norman*, who accordingly received the same for the purpose of being sold and disposed of as aforesaid, and the said defendant then accepted the said bill of exchange in the said first count mentioned, on the terms aforesaid, and the plaintiff did then write a letter to the said *J. Norman*, requesting him to remit and pay to the defendant the sum of 120*l.* out of the proceeds of the goods so consigned as aforesaid, when the same should have been sold and disposed of, for the purpose of enabling him, the said defendant, to pay the amount of the said bill of exchange when it should become due and payable. And the defendant further says, that afterwards, to wit, on 29th *September*, in the year aforesaid, the said bill of exchange in the first count mentioned became due and payable, and the proceeds of the said goods so consigned as aforesaid had not arrived in *England*, and the defendant then was and from thence hitherto hath been ready and willing to renew the said bill, and to accept another bill in lieu thereof, to be made and drawn on him the said defendant in manner and on the terms aforesaid, of all which premises the plaintiff then had

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notice; but the defendant in fact saith, that the
plaintiff then declined to draw any bill upon the defe
ant, to be accepted by him in lieu of the said bill of
change in the first count mentioned, and so due and
able, or to receive from the defendant any such bil
accepted. And the plaintiff then requested the defe
ant, that in lieu of paying the said bill in the said
count mentioned, or renewing the same, he the
defendant would write a letter to the said *J. Nor*
for the purpose of relinquishing all right and clain
the part of him the said defendant to receive the
sum of 120*l.*, or any part thereof, out of the proce
of the said goods so consigned as aforesaid,
requesting the said *J. Norman* to remit and pay to
plaintiff the whole of the proceeds of the said go
And the said defendant did accordingly afterward
wit, on the day and year last aforesaid, write a le
to the said *J. Norman*, and delivered the same to
said plaintiff, whereby he the said defendant did re
quish and give up all right and claim to receive
said sum of 120*l.*, or any part thereof, out of the
ceeds of the goods so consigned as aforesaid, and
request the said *J. Norman* to pay the whole of s
proceeds to the said plaintiff; and the said plai
then accepted and received the said letter; and
defendant saith, that he hath not received any v
or consideration for the payment by him the
defendant of the bill of exchange in the first co
mentioned. Verification.

Demurrer to the second plea, showing for ca
that the said bill of exchange is alleged to have b
given upon an agreement as to payment inconsis
with the tenor of the bill itself, and that the said
is double, and contains two alleged answers to
said action, to wit, firstly, that the said bill was gi
on an agreement for renewal, and that the said plai

had refused to accept a renewed bill; and, secondly, that the plaintiff had requested the defendant, in lieu of payment, to write a certain letter, and that the said plaintiff accepted the said letter; and that the said plea amounts to an accord without satisfaction; and that the said plea is repugnant, and in the first part of it shows a consideration for the said bill, which is alleged to have partly failed: and afterwards alleges that the defendant has received no consideration for the said bill, and that the said plea is in other respects informal, uncertain, and insufficient.

Cleasby in support of the demurrer. The second plea is double, for it sets up two sets of facts, either of which, if properly pleaded, would amount to a distinct answer to the action, viz. first, that the defendant is only liable on a contingency which has not happened; and, secondly, that he is not liable in consequence of the arrangement made after the maturity of the bill. These defences should have been the subject of separate pleas; and as they are joined together in one, it is demurrable for duplicity; for though insufficiently pleaded, it is so pleaded that no part can be rejected as surplusage, as some issue could be taken on it; *Bleke* v. *Grove* (*a*). [Lord *Abinger* C. B. The plea seems rather to be a history of the whole transaction on which the defendant relies for his defence, than to set up two distinct matters of answer to the plaintiff's case. It seems not to rely on the fact of giving the letter to *Norman* as a defence, except in conjunction with the circumstances previously stated.] Were the facts stated links of a chain affording in the whole one defence, the plea might be single (*b*), though it would be

(a) 1 Sid. 175. 1 Keb. 661. *S. C.* cited Bac. Ab. Pleas, &c. (K. 2.) Vol. 5. 445, 6th ed.

(b) See *Bardens* v. *Selby* in Error, *Ante*, Vol. III. 430. *S. C.* in K. B. 3 B. & Adol. 2. *Pigott* v. *Kemp*, *Ante*, Vol. III. 128.

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difficult to take issue on any one fact in it without passing over another which is material. [Lord *Abinger* C. B. The plaintiff might traverse the contract to forward goods to *Norman*. The whole plea seems a special accord and satisfaction.] It is also repugnant; for after stating an agreement between the plaintiff and defendant that the former should consign goods to *Norman*, the acting on which by the plaintiff was a sufficient consideration for payment of the bill by the defendant, it alleges that the defendant has received no consideration for such payment.

Wightman in support of the plea. The transaction is single, though consisting of two parts, viz. the defendant's agreement to accept the bill, and his agreement to pay it on a certain event. Now the plea, after admitting the agreement to be a good consideration for accepting the bill, denies that it is a sufficient consideration for paying it after *Norman*'s default to send the proceeds. Then the defence is single.

Per Curiam.—Primâ facie the conclusion of the plea is repugnant to its commencement; for the last words of it import that the bill was without consideration. The effect of the plea is accord and satisfaction, till it concludes by stating, not that there was no other consideration than that before mentioned, but that there was none at all. That allegation should have been confined to the non-receipt of proceeds of the consignment to *Norman* since the letter to him. The defendant may amend on payment of costs.

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ANGERSTEIN *against* HANDSON.

ASSUMPSIT. The declaration stated that the defendant theretofore, to wit, on the 6th *April* 1831, became and was tenant to the plaintiff of a certain farm and lands called *Otley*, consisting (amongst other things) of divers, to wit, 600 acres of arable land, with the appurtenances, situate &c.: and in consideration thereof, he the defendant, on the day and year aforesaid, promised the plaintiff to use, cultivate, and manage the said farm and lands, with the appurtenances, during the continuance of the said tenancy, according to the course of good husbandry, and the custom of the country where the said lands were and are so situate as aforesaid: and the plaintiff avers that the defendant was and continued tenant to him of the said farm and lands, with the appurtenances, for a long space of time, to wit, from the day and year aforesaid, until and upon the day of the commencement of this suit: and the plaintiff further saith, that according to the course of good husbandry, and the custom of the country where the said farm and lands were and are so situate as aforesaid, the defendant, before and at the time of the commencement of this suit, ought to have had about one-half only of the said arable lands in corn, and one-fourth part thereof in seeds, and the remaining one-fourth part thereof in turnips, or to have been fallow in each and every year of the said tenancy: yet the defendant, well knowing the premises, but disregarding his promise, and contriving &c. to injure the plaintiff in

A declaration alleged that the defendant undertook to cultivate and manage a farm and lands "according to the course of good husbandry, and the custom of the country where they were situate;" and then averred that according to the course of good husbandry, and the custom of the country, the defendant ought to have had about one-half only of the arable lands in corn, one-fourth in seeds, and the remaining fourth in turnips or fallow: and alleged as a breach, that the defendant had more than one-half in corn, had no seeds, and less than the proper quantity of turnip fallow. Plea: traversing the custom, and not the instances of mismanagement. The jury found that the defendant had managed the farm contrary to the course of good husbandry in the neighbourhood, but denied the custom as laid by the plaintiff: Held, that the plaintiff was bound to prove the custom as laid in the declaration, and not having so done, was not entitled to recover.

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this behalf, after the making of his said promise, ar during the continuance of the said tenancy, to wi before and at the time of the commencement of th suit, had divers, to wit, 500 acres of the arable land i corn, the same being much more than one-half of tl said arable land, contrary to the course of good hu bandry, and the custom of the country where the sa farms and lands were and are so situate as aforesai and the promise of the said defendant so by him ma as aforesaid: and the plaintiff further saith, that t defendant further disregarding &c., and further co triving &c., after the making of his said promise, a during the continuance of the said tenancy, to wit, & wrongfully and unjustly omitted and neglected to ha one-fourth, or any part whatever of the said arat land in seeds, contrary to the course of good hu bandry, and the custom of the country where the sa farm and lands were and are so situate as aforesai and the promise of him the defendant so made as afor said: and the plaintiff, further disregarding &c., an further contriving &c., after the making of his sa promise, and during the continuance of the said t nancy, to wit, before &c., wrongfully and unjust suffered and permitted only a small portion, and mu less, to wit, 100 acres less than one-fourth of the sa arable land, to be in fallow or turnips, contrary to tl course of good husbandry and the custom of tl country where the said farm and lands were and a so situate as aforesaid, and the promise of the defen ant so by him made as aforesaid. By means where &c. (*a*). Plea: that though true it is that he promis

(*a*) The above was originally the second count, being preceded another which stated that plaintiff had let other lands to defendant, a that in consideration thereof defendant promised to use, cultivate, a manage the said lands according to the course of good husbandry :—aver that defendant became and continued tenant, (omitting the other averme

in manner and form as the plaintiff has above alleged, nevertheless for plea in this behalf the defendant says, that according to the course of good husbandry and the custom of the country where the said farm and lands were and are so situate as aforesaid, it was not the duty of the defendant to have had about one-half only of the said arable land in corn, and one-fourth part thereof in seeds, and the remaining one-fourth part thereof in turnips, or to have been fallow in each and every year of the said tenancy, in manner and form as the plaintiff hath above alleged. Conclusion to the country.

At the trial before *A. Park* J. at the last *Lincolnshire* assizes, the plaintiff's witnesses stated three or four different modes of managing land in the neighbourhood where the farm was, and among them that stated in the first count; but it did not appear to be more prevalent than one or two other modes of cropping. For defendant, it was objected that the allegation being entire and traversed, it was incumbent on plaintiff to prove the custom laid to be prevalent throughout all that county. The learned judge expressed his strong opinion that the custom was not proved as laid in the declaration, but on the authority of *Legh* v. *Hewit* (*a*) recommended that the jury should assess the damages, giving defendant leave to move to enter a nonsuit if the court should be of opinion that the allegation was not supported by the proof, and that it was entire. All the witnesses agreed that the course of cropping adopted by the defendant was not according to good husbandry. In summing up, the judge told the jury that the custom

and assigning for breach that defendant did not nor would use, cultivate, and manage the land *according to the course of good husbandry*, and on the contrary thereof, managed the farms in such an unhusbandlike manner that the lands were greatly impoverished: but this count was struck out by a learned baron on summons, on *Reg. Gen. Hil.* 4 *W.* 4. No. 6.

(*a*) 4 East, 154.

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need not be universal; and that all that was necessary to be proved was, that the prevailing custom was as laid in the declaration; directing the jury, that if they thought the defendant had mismanaged the farm, both against good husbandry and the custom of the country then the plaintiff was entitled to a verdict; if against neither, or if against good husbandry, but not against the custom of the country, then that they should find a verdict for defendant. The jury stated in answer to the judge's questions, that the defendant had managed the farm contrary to the course of good husbandry in the neighbourhood, and that there was no custom of the country as stated in the declaration. Verdict for the plaintiff. A rule to enter a nonsuit having been obtained by *Goulburn* Serjt. in last term, pursuant to the leave reserved,

N. R. Clarke showed cause. The plaintiff is entitled to judgment, for issue is joined, not on the mismanagement of the farm, but on the custom of the country, which is an immaterial point. It was sufficient for him to prove that part of the breach only which states that the defendant cultivated the farm contrary to good husbandry, though it was also laid to be contrary to the custom of the country, *Legh* v. *Hewit* (a). There the promise was to occupy a farm in a good and husbandlike manner, according to the custom of the country, and the breach alleged was, that he had treated it *contrary to the prevalent course of good husbandry in that neighbourhood*, by tilling half his farm at once. The proof was, that the practice of good husbandmen in the neighbourhood was to till only a third, and of many, only a fourth of a farm. They agreed that the defendant's practice was contrary to the course of good husbandry, and prejudicial

(a) 4 East, 154.

to the land; but could not speak to any custom of the country, independent of the obligation of covenants. The jury found a verdict for the defendant on the latter ground. On a rule for a new trial it was contended for the plaintiff, that the promise to use and occupy the premises in a good and husbandlike manner, according to the custom of the country where the said premises lie, was laid as one, and not as two distinct allegations. Lord *Ellenborough* in his judgment said, "the jury have found a verdict for the defendant under an impression that the words in the declaration, 'according to the custom of the country,' require a more strict and specific proof than I think they demand." After stating the terms of the promise, he continued: "From the subject-matter of the contract it is evident that the word 'custom' as here used, cannot mean a 'custom' in the strict legal signification of the word, for that must be taken with reference to some defined limit or space which is essential to every custom properly so called. But no particular place is here assigned to it, nor is it capable of being so applied. What shall be considered in farming as a 'good husbandlike manner' must vary exceedingly, according to soil, climate, and situation. And therefore the 'custom of the country,' with reference to good husbandry, must be applied to the approved habits of husbandry in the neighbourhood, under circumstances of the like nature." *Lawrence* J. said, "that it was not necessary in order to maintain the declaration, that the plaintiff should prove a definite known custom or course of husbandry in that country, and a breach of it by the defendant;" adding "it is sufficient to show what was the prevalent course of good management there, which was the course of management according to good husbandry which the defendant undertook to observe, and by proving that the estate

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was not so managed, the plaintiff made out ı undertook to do, namely, that the estate was in a manner contrary to good husbandry and ı tom of the country." *Le Blanc* J. conside words of the declaration, taken altogether, to ı more than if the promise had been laid to be to manage the farm in a good and husbandlike ı which must always be taken with reference usage and mode of cultivation in that part country where the land lies; adding, "here proved that no custom of the country authori: manner in which the defendant had treated this and that was sufficient to make out the allegati he had managed it contrary to good husband the custom of the country." Then, if the need not be proved, it need not have been a and the issue taken thereon must be immaterial finding the cultivation to have been against go bandry, is substantially a finding for the plainti being the material breach, and the denial of the being no answer to it. [Lord *Abinger* C. B. not the plea have alleged what the custom wa averred that the cultivation was in accordanc it?] That would have tendered a material i the plaintiff. [*Parke* B. The plea is in subs confession of the breaches, if that which the p alleges is the custom of the country.] The def having admitted the promise could only allege ı had performed it. The court will give judgm the plaintiff non obstante veredicto; for a reple not granted in cases like this, where the matter, pleaded, would not be an answer to the action. J *Bodinham* (*a*), *Rex* v. *Philips* (*b*).

(*a*) 1 Salk. 173.

(*b*) Stra. 494; 1 Burr. 292; Bac. Ab. tit. Repleader. Vol. V. 4

Goulburn Serjt. and *Whitehurst* for the defendant were stopped by the court. [Lord *Abinger* C. B. It is desirable to consider the evidence given, before we go further. Suppose on reading the notes that a custom should appear to be proved, which though not stated in the declaration, regulated the management of the best farms in the neighbourhood, and had been followed by the defendant, it would be questionable whether it afforded a defence on the merits. If on the other hand he had followed neither that stated nor that proved, it would be a question whether the verdict should not have been for the plaintiff on the merits.

Cur. adv. vult.

The judgment of the court was afterwards delivered by

PARKE B.—This was an action brought by a landlord against his tenant, for cultivating a farm held by the defendant of the plaintiff, contrary to good husbandry and the custom of the country. The declaration alleged that the defendant undertook to cultivate and manage the farm and lands according to the course of good husbandry and the custom of the country where the farm and lands were situate; that is, in substance, that he undertook to manage the farm according to the prevailing course of good husbandry in the neighbourhood. It then alleged a custom, that according to the course of good husbandry, and the custom of the country, the defendant ought to have had about one-half only of the arable lands in corn, one-fourth part in seeds, and the remaining fourth part in turnips or fallow. Then as a breach of that custom, it averred that the defendant had more than one-half of the arable lands in corn, and had not one-fourth in seeds, and had less than a fourth in fallow or

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turnips. To this declaration the defendant pleaded that by the course of good husbandry and the custom of the country, it was not the defendant's duty to have had about one-half only of the arable lands in corn, and one-fourth part thereof in seeds, and the remaining fourth in turnips or fallow; that is, he traversed the custom as laid in the declaration. On the trial, it appeared that no such custom existed, but that another course prevailed in the neighbourhood, which was considered good husbandry. The learned judge was of opinion at the trial that the issue as framed ought to be found for the defendant, and we agree with him; for the plaintiff, by the form of his declaration, has made the custom material, and is tied up to prove the specific custom as laid. He need not have declared as he has done, but might have stated generally that the defendant did not cultivate according to good husbandry and the custom of the country; alleging, as a breach, that he had not so cultivated, and, on the contrary, had more land, to wit,——acres, in corn than he ought to have had; and so on with the other breaches. That count would have left the custom more at large; but as the case stands, the plaintiff having failed to prove the precise custom, as alleged in the declaration, was not, in our opinion, entitled to recover. No application to amend was made at the trial, but having been now made, it is granted on payment of costs. The rule must not be absolute to enter a nonsuit, but for a new trial on payment of costs.

Rule accordingly.

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HOWARTH *against* HUBBERSTY.

A rule obtained on *Reg. Gen. Hil.* 4 *W.* 4. No. 2. for setting aside a demurrer as frivolous, must be drawn up on reading the pleadings demurred to with the demurrer and marginal statement, or will be discharged.

Office copy of affidavit stated that the deponent *said* instead of *saith*: Held bad.

No costs allowed for appearing to support a demurrer which has been entered in the paper before joinder, and without delivering demurrer books to the judges.

ASSUMPSIT. Payee against maker of a promissory note. Plea: that no consideration was given by the plaintiff to the defendant for the note (*a*). Replication: that good consideration was given for it by the plaintiff to the defendant; concluding to the country. Demurrer to the replication, for not showing what the consideration was, and for concluding to the country and not with a verification. *Tomlinson* had obtained a rule to set aside the demurrer as frivolous, and for leave to sign judgment for want of a rejoinder. See *Reg. Gen. Hil.* 4 *W.* 4. Rule 2. [*Ante*, Vol. IV. p. i.]

Mansel objected that the affidavit in support of the rule was insufficient, as the only material fact in it respecting the demurrer, was preceded, in the office copy, by this deponent further *said* instead of *saith*. [Lord *Abinger* C. B. What he "said," might be some time ago, and not what he now swears in his affidavit.]

Tomlinson contrà, was about to argue from the pleadings themselves annexed to his affidavit; but as his rule was not drawn up on reading the declaration and subsequent pleadings as well as the marginal note on the demurrer, it was discharged, but without costs.

A cross rule obtained by *Mansel* in the same cause, for costs of appearing to support the demurrer on the last paper day, was discharged with costs, on the ground that there was no occasion to appear, as the demurrer had been entered in the paper before joinder, and without delivering demurrer books to the judges.

(*a*) See *Carr* v. *Hinchliff*, 4 B. & Cr. 547. *Maggs* v. *Ames*, 4 Bing. 473. See also 5 B. & Adol. 101. 4 ed. 705.

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UNDERSHELL *against* FULLER.

A declaration in one count stated a promise to the plaintiff, and *H.* in his life-time, now deceased. In another count it stated, that in the life-time of *the said H.* the defendant was indebted to the plaintiff, and *the said H.* and promised the plaintiff and *the said H.* in his life-time to pay, without stating that *H.* was since dead. Defendant pleaded to the first count, and demurred to the second, for not averring the death of *H.* The demurrer was set aside as frivolous under *Reg. Gen. H. 4 W.* 4. No. 2.

ASSUMPSIT. The first count stated, that the defendant heretofore and in the life-time of *W. Harvey*, now deceased, made a certain bill of exchange &c., stating a promise to the plaintiff and *Harvey*. Another count was in indebitatus assumpsit, for interest and on an account stated, commencing thus: "And whereas also in the life-time *of the said W. Harvey*." It then proceeded to state that the defendant was indebted to the said plaintiff and the said *Harvey*, and promised the said plaintiff and the said *Harvey* in his life-time to pay &c., without averring that *Harvey* was now dead. Plea, to the first, and demurrer to the second count, stating for cause, that *Harvey*'s death did not appear in that count, and that he therefore ought to have been made a co-plaintiff.

Crompton obtained a rule to set aside this demurrer, and for leave to sign judgment on the second count, on the ground that the demurrer and marginal statement were frivolous; see *Reg. Gen. Hil.* 4 *W.* 4. Rule 2. [*Ante*, Vol. IV. p. 1.] and on reading the declaration, demurrer, and marginal statement, and joinder (*a*).

Cause was shown by *Channell*, that as the case had been before two of the barons at chambers who had not interfered, the demurrer should have been set down for argument within the term.

Per Curiam.—It is not clear that it could have been argued within the term (*b*). We think the matter stated in the demurrer frivolous. Leave to amend given on paying costs of the demurrer and of the application.

(*a*) See last case. (*b*) See *Britten* v. *Britten*, 2 Dowl. P. C. 239.

*** Page 309, line 5 from bottom, after "assignees" add "under the deed."

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DE ROSNE *against* FAIRRIE and Others.

CASE for infringing a patent. The declaration stated, that before and at the time of the making of the letters-patent, and of the committing of the grievances by the said defendants, as hereinafter mentioned, the said plaintiff was, within the true intent and meaning of a certain act of parliament made and passed &c. (reciting title of stat. 21 *Jac.* 1. c. 3.) the first and true inventor of certain improvements in extracting sugar or syrups from cane-juice and other substances containing sugar, and in refining sugar and syrups; which said improvements, others, at the time of the making of the said letters-patent, did not use, and thereupon our

A patent recited in its title that the patentee was the first and true inventor of certain improvements in *extracting* sugar and syrups from cane-juice and other substances containing sugar, and in refining sugar and syrups. The specification stated a method of depriving syrups of every description of colour, by filtering them through charcoal produced by the distillation of bituminous schistus and used alone, or mixed with animal charcoal, or even through animal charcoal alone, when placed in thick beds. In an action for infringing the patent it was pleaded, that the patentee did not, by any instrument in writing, particularly describe and ascertain the nature of his invention, and in what manner the same was to be and might be performed. On allegation that the title had claimed a larger invention than was disclosed by the specification; it was held, first, that the specification sufficiently described both branches of the invention recited in the title of the patent, viz. the refining sugar by melting it after it had granulated, and applying the patent process to it after having thus brought it into the state of syrup; and also to extract syrup from the cane-juice before it had been so far subjected to the action of fire as to granulate and become sugar: and secondly, that the word 'improvements' being in the plural was of no consequence, as every part of the process might be treated as an improvement. It appeared that iron was combined with the bituminous schistus found in this country, and it was doubtful whether the charcoal produced by the schistus was not only disadvantageous, but injurious to the matter going through the process. The charcoal sworn to have answered the purpose of the patent was received from the plaintiff at *Paris*, where it had been made, and was declared by him to be the residuum of bituminous schistus from which the iron had been extracted. But no means existed of ascertaining in this country, of what substance it actually was the residuum, nor did the specification mention any process for extracting the iron from bituminous schistus.

Held, that whether the latter omission avoided the patent or not, the patentee ought to prove, either that the presence of iron in the bituminous schistus used in the process of filtering, was not absolutely disadvantageous to the matter going through that process, or that the method of extracting the iron from it was so simple and known that a person practically acquainted with the subject could accomplish it with ease, or that bituminous schistus, as known in England, could be used in this process with advantage; and a verdict having been found for the plaintiff, the court set it aside on terms, and granted a new trial.

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lord the now king, on 29th *September* 1830, by his letters-patent, bearing date &c. (profert), after reciting, amongst other things, that the said plaintiff had by his petition humbly represented, that he the said plaintiff, in consequence of a communication made to him by a certain foreigner residing abroad, and by invention by himself, was in possession of an invention for certain improvements in extracting sugar or syrups from cane-juice, and other substances containing sugar, and in refining sugar and syrups, that the same was new in *England*, *Wales*, and the town of *Berwick on Tweed*, and in the *British* colonies, and had never been practised therein by any other person or persons whomsoever, to his the said plaintiff's knowledge and belief, our lord the king, of his especial grace &c., did give and grant to the plaintiff, his executors, administrators, and assigns, his especial licence, full power, sole privilege and authority, that he the said plaintiff, his executors &c., and no others, during the term of years therein expressed, should and might make, use, exercise, and vend his said invention, within *England* &c. The declaration then set forth the patent, the inrolment thereof of record in Chancery, and assigned as a breach that the defendants had made use of the said invention, without the licence of the plaintiff. Pleas: first, not guilty of the grievances; secondly, that the plaintiff was not, at the time of the making of the said letters-patent, the true and first inventor of the said improvements in extracting sugar, and in refining sugar and syrups, in manner and form as alleged in the declaration; thirdly, that the plaintiff did not, by any instrument in writing, particularly describe and ascertain the nature of his said invention, and in what manner the same was to be and might be performed, in manner and form &c.; fourthly, that the plaintiff did not cause any instrument in writing, particularly describing and ascertaining the nature of the said invention, and in

what manner the same was to be performed, to be inrolled in his said majesty's high court of chancery, in manner and form &c. Issues on all the pleas.

At the trial before Lord *Abinger* C. B. at the *Middlesex* sittings, an examined copy of the specification was produced and proved. The material parts were as follow:—

The grant by letters-patent, which was recited in the first part or title of the specification, was for the use, by the plaintiff, of an invention of "certain improvements to be used in the course of extracting sugar or syrup from cane-juice and other substances containing sugar, and in refining sugar and syrup, partly communicated to the plaintiff by a certain foreigner residing abroad." The specification stated the plaintiff's invention to consist in a means of *discolouring* (*a*) syrups of every description by means of charcoal, produced by the distillation of bituminous schistus alone, or mixed with animal charcoal, and even of animal charcoal alone. Whatever sort of charcoal it may be it must be disposed of on beds very thick, on a filter of any suitable form. The specification then described the process; amongst other things stating, that the charcoal must be in a state of division, about the size of fine gunpowder, being found to be very fit for the operation. It then concluded, "the syrups from which it is desired to separate colouring matter can be obtained directly from the juice of cane or of beet-root, or from the saccharine matter produced by the action of sulphuric acid upon the farinaceous matters, before these juices have been *baked* (*b*) for extracting the sugar. The

(a) Used in the sense of depriving of colour: "*Decolorer.*"

(b) It was admitted at the trial, and so stated by the lord chief baron to the jury, that "baked" had been incorrectly used by the plaintiff, a foreigner. He meant before crystallization, *i.e.* before the process was complete for extracting sugar.

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syrup may likewise be produced by the solution of all kinds of sugar, and of the products of inferior quality, which are obtained in sugar refining under the name of bastards, and other sugars. The purpose of producing of syrups may be to sell them in such a state for the ordinary consumption, or to bake them for making sugar whiter than is obtained by the common process; or these whitened syrups may be used for discolouring the refined sugar in making them filter through the loaves, for replacing the use of the earth and water; the object of the invention being to obtain discoloured syrups by the means above described. This discolouration of syrups is always proportionate to their primitive colouration and to the quantity of charcoal which is used. The carbonization of bituminous schistus has nothing particular, it is produced in closed vessels, as is done for producing animal charcoal; only it is convenient, before the carbonization, to separate from the bituminous schistus the sulphurets of iron which are mixed with it."

Evidence was given to show that the specification was correct, in law and in fact; but it is not necessary to detail it, in order to explain the grounds upon which the court granted a new trial. The plaintiffs proved that the invention was new and useful when applied to refining sugar; that it could be applied in the process of making sugar from potatoes and beet-root and that it had been applied in the colonies to the syrup coming from the canes before it had granulated into sugar. But it did not appear clear, upon the evidence, whether bituminous schistus was or was not capable of being purified from the sulphurets of iron with which it is mixed, so that it should not be prejudicial to the sugar, by colouring it in the course of operation.

The counsel for the defendants objected that the

specification did not support the title, inasmuch as the title was a claim for two inventions, viz. the extraction of sugar from cane-juice, and the refining of sugar and syrups so extracted: secondly, that the description did not show how the invention was to be applied to the juice as it came from the cane before boiling, and therefore did not contain a full description of the professed improvements: and, thirdly, that it was not shown in what manner the bituminous schistus could be purified from the iron; and that, upon the whole, it was the duty of the learned judge to direct a nonsuit. The learned judge, however, reserved all points of law arising upon the title and specification for the consideration of the court above, and directed the jury to find a verdict for the plaintiff or defendants, according as they found the description of the bituminous schistus to be sufficient or insufficient, so that all the world could or could not use it. The jury found a verdict for the plaintiff, saying, that it seemed to them that the bituminous schistus might be used, and was properly described in the specification.

Sir *F. Pollock* having obtained a rule nisi for entering a nonsuit, upon the grounds above stated,

Sir *John Campbell*, Attorney-General, *Ludlow* Serjt. and *Godson* now showed cause against that rule, and contended, first, that there was no plea that the title was bad, and that under the plea alleging the insufficiency of the specification, the defendants were not at liberty to object to it; secondly, that the title was good in all its parts, for that the extraction of sugar was not complete until the syrup had granulated, and that this process could be and was applied in the *West Indies*, whilst the cane-juice was in the state of syrup; and also because in extracting sugar from beet-root

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this invention was proved to have been always applied before the sugar was formed. Upon these points they cited *Bloxam* v. *Elsee* (*a*), *King* v. *Wheeler* (*b*), *The King* v. *Metcalfe* (*c*), *Hill* v. *Thompson* (*d*), *Cochrane* v *Smethurst* (*e*), and *The King* v. *Cutler* (*f*). Thirdly, as to the application of the invention to cane-juice before it is boiled, it was answered that it was never intended to be so applied until it was boiled and became syrup and in that state it was beneficial and useful. Fourthly as to the bituminous schistus, the words of the specification are,—"The carbonization of bituminous schistus has nothing particular. It is produced in close vessels, as is done for producing animal charcoal (*g*) only *it is convenient*, before the carbonization, to separate from the bituminous schistus the sulphurets of iron which are mixed with it." The schistus is mechanically, not chemically, combined with the iron and therefore the iron could not be prejudicial to or affect the sugar; and further, it could be removed by the simple mechanical operation of breaking the schistus and taking out the nodules, in which it is generally found in it. It would therefore have been proper to have given a description of so easy an operation, *Savory* v. *Price* (*h*); and at all events, suppose the schistus did not completely answer the specific purpose, the process was new; now *Lewis* v. *Fleming* (*i*) and *Haworth* v. *Hardcastle* (*k*), have der

(*a*) 6 Barn. & Cress. 169. (*b*) 2 Barn. & Ald. 350.
(*c*) 2 Stark. N. P. C. 249.
(*d*) 2 B. Moore, 454; 8 Taunt. 375; Holt, 636, *S. C.*
(*e*) 1 Stark. N. P. C. 205. (*f*) 1 Stark. N. P. C. 3
(*g*) At the trial Mr. Farraday, the eminent chemist, said, stood this to mean charring the bituminous schistus in close ves the volatile matters arising from calcination (viz. tar, &c.) fly taining the residuum—a charcoal.
(*h*) 1 Ryan & Moody, 1. (*i*) 10 Barn. & Cre
(*k*) 1 Bingh. New Cases, 182.

that although every part of an invention must be new, yet every part need not be useful; and moreover, there was no evidence to show that schistus could not be used to some extent.

Sir *Frederick Pollock*, Sir *William Follett* and *Crowder* in support of the rule, were stopped by the court.

Lord Abinger C. B.—The Court has entertained doubts what rule should be pronounced in this case. My impression at the trial was strong that there was no evidence to go to the jury in support of the patent, and that it was incumbent on the plaintiff to show, either that there was some bituminous schistus found in this country, which, after having been exposed to the process of distillation described in the specification, might be used with effect, and without detriment to the sugar, though one of its component parts, iron, was not entirely removed from it; or that there was some known process of removing that iron from it. But, when I summed up, my impression was, that the agent of the plaintiff must have stated in his evidence something on this point which had escaped me at the time he gave his evidence; and being very anxious not to multiply trials, or to withdraw any thing from the jury, I left the case to them more on that apprehension than from any conviction I entertained that the plaintiff had made out his case. I also said, that if I was wrong in leaving the case to the jury, the defendants' counsel should have the benefit of it. Then, as the case went to the jury, who found for the plaintiff, the defendants are compelled to make this motion, whereas the plaintiff, had he been nonsuited, must, in order to obtain a new trial, have stated that he was surprised by the objection, and could have answered it by evidence, had he been fully aware of it. The question

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for the court has therefore been, on what terms we ought to direct the new trial? The verdict must be set aside and a new trial had; but in case the defendants shall finally succeed in obtaining judgment on the second trial, after obtaining a verdict, or if the plaintiff shall be nonsuited, the defendants shall have the costs of the first trial and of this application as costs in the cause; whereas if the plaintiff shall succeed upon the second trial, he is not to have the costs of the first trial, or of this application, as costs in the cause, because the new trial is granted for the plaintiff's benefit, to enable him to make out the case, which he failed in doing at the first trial; so that the costs of the last trial will in effect abide the event of the costs in the cause if the defendants succeed, but will not abide the event of the costs in the cause if the plaintiff succeeds. We think it right, however, to dispose of some of the objections that have been made. One objection to the plaintiff's specification is rested on the ground that it does not set forth that double process which one would expect from the title of the patent. It is unnecessary now to solve that difficulty, as the court doubts whether or not, since the new rules of pleading, that objection is fairly let in by the present pleas. The objection is, that the plea states the plaintiff's specification to be insufficient whereas it is said, that, supposing we think the title adequate, it is sufficient to describe the invention that he really had made, even if it be not sufficient to describe the second branch of the invention set forth in this patent. The defendants may avail themselves of the objection, that the plaintiff has taken out a patent too large for his invention, by putting in an additional plea in a different form from that stated on this record. We do not think that the question necessarily arises at present, or that it calls for an

ultimate decision, because we think, on consideration, that the double process, viz. both the branches of the invention mentioned in the patent are sufficiently described in the specification. Now I have come to that conclusion in consequence of the discussion on this motion. The patent purposes to be a patent for an improvement in extracting sugar from the cane-juice, as well as in the refining of sugar subsequently. Now it appeared on the evidence, that the only attempt to use it when applied to the cane-juice before it was boiled failed; but I think, on the investigation to-day, it does appear, though it is very awkwardly expressed, that the plaintiff, who is probably not very conversant with our language, did mean in his specification to embrace both branches of the title of his invention in this way: "I mean to apply my invention to the refining of sugar by melting the muscovado (or granulated) sugar, and bringing it into syrup, and then applying the invention to it; or by applying it in the process of extracting the sugar from the cane-juice before it is baked or boiled (*a*) and made into syrup." Mr. *Godson* has given a satisfactory solution of that obscure passage in his client's specification, and rendered it more satisfactory by the words immediately following: because he presented the case of extracting the sugar from the cane-juice, in opposition to that of refining the sugar after it has been boiled and manufactured into muscovado sugar; and therefore, construing it with that view, it appears to me that the plaintiff meant to use the word "*extract*" in the sense in which the chemists who were called as witnesses said they understood it, and that he meant also to extract sugar or syrup from the juice before it is boiled (*a*) and made sugar; but it is in evidence that it is made into syrup before it comes into that degree of baking or

(*a*) *Ante*, 3, note (*b*).

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boiling by the action of fire as to make it granulate; it is made into syrup after it has derived a certain consistency, by passing one, two, or three coppers; but it must pass through at least two others before it is in a state to granulate and to be made sugar. Therefore I think the expression "*extract*" may be fairly understood to mean the process to be applied with advantage to the extracting of syrup from cane-juice, before it arrives at that consistency of making it granulate, so as to make it into sugar; and with that explanation I think the objection that was made is removed. Supposing this specification is good on the face of it, it must be understood in other respects as compared with the evidence to be a specification of both branches of that invention; and if so, that objection is removed. I think also the word 'improvements' was relied on as being in the plural number; but that is of no consequence, because the plaintiff may mean that every part of his process is to be treated as an improvement, forming together a series. It is a phrase that may be reconciled to the fact, because syrup, in the proper meaning of the word, is not extracted from the cane-juice any more than sugar is; but in the process of what is called extracting sugar from the cane-juice, it is made into syrup, and therefore it is an improvement in extracting sugar; à fortiori, it may be said to be an improvement in extracting syrup. Upon the main point, however, that respecting the bituminous schistus, nothing that I have heard has removed my original impression, that there was no evidence to show that this process, carried on with bituminous schistus in combination with any iron whatsoever, would answer at all. The plaintiff himself has declared, that in that bituminous schistus which he himself furnished, the whole iron was extracted; and it appears that it was admitted by the counsel that the presence of iron would not only be disadvantageous;

but injurious. Therefore, as it appeared by the evidence, that in all the various forms in which the article exists in this country sulphuret of iron is found, and the witnesses not describing any known process by which it can be extracted, I am of opinion that the plaintiff ought to have proved one of two things, either that the sulphuret of iron in bituminous schistus is not so absolutely detrimental as to make its presence disadvantageous to the process, (in which case this patent would be good,) or that the process of extracting the iron from it is so simple and known, that a practical man may be able to accomplish it with ease. The bituminous schistus which was procured and used was exclusively that which was furnished by the plaintiff, not in its original state, but pulverized after it had undergone distillation and been made into charcoal in a foreign country; now in that stage of its preparation, it could not be discovered by examination, whether it was made from one substance or another; the residuum, after distillation of almost every matter, vegetable as well as animal, being a charcoal, though mixed more or less with other things. Then there is only the plaintiff's statement to prove that the substance which was furnished by him and used by the witness was charcoal of bituminous schistus. It appeared, also, that he had declared to one of the witnesses, that he had extracted all the iron from the substance so sent, and that it had also undergone another process. I am therefore of opinion, that without considering whether or not the patent would be avoided by the patentee's keeping secret the means requisite to extract the iron from the bituminous schistus, he has not shown in this case that what he has described in the patent could be used as so described, without injury to the matter going through the process. Under all these circumstances we think the plaintiff ought to have given some evidence to show

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that bituminous schistus, in the state in whi found and known in *England*, could be used process with advantage; and as he has not do the defendant is entitled to a nonsuit; but, at t time, as it is alleged that the plaintiff may, on trial, supply the defect of proof as to the sch other evidence, we are desirous that the pate good one, should not be affected by our judgme think it right to direct a new trial, on the term I have stated.

Parke B.—I entirely agree with my lord in respect to the construction of this paten cannot on the face of it say, that as comparing the specification, it is void. The specificatio on the whole, truly describe the nature of the tion as declared in the patent, nor does there to me to be sufficient obscurity in the clause ference to the baking to avoid the patent on that g But it seems to me to have been clearly the duty plaintiff to have done one of two things, viz. ei have shown that bituminous schistus, with the ture of sulphuret of iron, as it is known to e *England*, would answer the purpose beneficiall that the sulphuret could be removed by any p man so as to give no colour to the syrup. Now certainly some doubt whether there was not ev for the jury, that a practical man, acquainted w subject might without much difficulty effect t moval to such an extent, that it might not be su to give any colour to the sugar, and therefore prejudicial a tall; but as my lord *Abinger*, up evidence before him at the trial, seems to think wise on this last point, I entirely concur with hin the terms on which I think a new trial ought granted.

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BOLLAND B.—I perfectly agree with the view that has been taken of this matter by the court. The objection made was, that the title of this patent was too large for the specification. Now had that appeared to be the fact, I should have felt myself bound by that rule of law which I have always understood to prevail in cases of this sort, viz. that where a title is set out in the patent, it is the bounden duty of the patentee to specify the whole set out in that title; but as it appears to me, for the reasons that have been already given by Lord *Abinger*, that the word *extracting*, and that other part of the title which perhaps is more objectionable than the word *extracting* could be, viz. that the making of syrup is fairly to be referred to the whole of the process during the time that the juice is expressed till it is reduced into syrup, I think the objection to the title is sufficiently removed. Very early in the argument it appeared to me that justice could not be done in this case unless we granted a new trial; because on the lord chief baron's notes it appeared that no evidence had been given by the plaintiff that bituminous schistus, procured from whatever place in which that substance could be found, would answer the purpose intended. The only evidence given by the plaintiff that bituminous schistus, when applied to the process described, produced the desired effect, applied to a pulverized substance, which the witness had purchased from the plaintiff at *Paris*. Now if the plaintiff had gone on to show that that substance was bituminous schistus, to which nothing had been done, but that it had produced the effect in its natural state, a great portion of that difficulty would have been removed; but that not being done, it was left in doubt whether all bituminous schistus would produce the effect attributed to it in the patent. Without doubt the onus of that proof lay on the plaintiff. An authority, if wanting, may be found in the

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judgment of Mr. Justice *Buller*, in the early case o *Turner* v. *Winter* (a). That very learned judge adde most extensive information on the subject of paten rights to that knowledge of law in which he was a least equal to any person who before or since hi time has occupied a seat on the bench. I will, there fore, advert more particularly to his judgment in tha case, in order to adopt its terms in application to the present. That patent had been taken out for producing yellow paint, to be applied in the process o painting in oil or in water-colour. The patentee attributed to this patent also another quality, viz. making white lead, and separating the mineral alkali from common salt; and Mr. Justice *Buller*, in giving judgment, said, "I do not agree with the counsel who have argued against the rule, in saying that it was not necessary for the plaintiff to give any evidence to show what the invention was, and that the proof that the specification was improper lay on the defendant; fo I hold that a plaintiff must give some evidence to show what his invention was, unless the other side admit th it has been tried and succeeds. But whenever th patentee brings an action on his patent, if the novel or effect of the invention be disputed, he must show what his invention consists, and that he produced effect proposed by the patent in the manner specif Slight evidence of this on his part is sufficient, and then incumbent on the defendant to falsify the spe cation." In this case the plaintiff contents himsel merely saying that bituminous schistus will answe purpose intended; but he ought, in my opinic have gone farther, and shown that any bitum schistus fairly procured either from chemists habit of selling that article, or in any other way,

(a) 1 T. R. 607.

have also sufficed for the purpose intended; whereas he has merely shown that the preparation made by himself in *Paris*, with the ingredients of which we are not at all acquainted any farther than that he told the witness that the iron had been taken out of it, produced the desired effect. He was bound to have informed the public how the iron was removed from the schistus, or to show that its presence was immaterial. On these grounds, as well as for the reasons given by my lord chief baron, a new trial ought to be had.

ALDERSON B.—I quite agree with the view the rest of the court have taken of this case. The first objection to the validity of the patent arises upon the ground that the title of the patent is too general, and has been, I think, already answered satisfactorily from the bench; and I certainly entertain considerable doubts whether it is open to be taken upon these pleadings. With respect to the other point, the question arises on the validity of the specification. Now a specification must state one or more methods which can be followed, for the purpose of accomplishing and carrying into effect the invention. One of the methods stated in this case is the application of a filter, composed of charcoal formed by the distillation or carbonization of bituminous schistus. It must therefore be shown that that purpose will be accomplished by following that method. It appears, too, that there is some little doubt entertained, whether, if iron be present in the charcoal formed from the carbonisation of bituminous schistus, the experiment of depriving sugar of colour in this particular manner does not altogether fail? With respect to that, on reading the notes, I should have entertained some doubt, but for the admission supposed to be made, that iron was in the schistus and detrimental; but it is much more competent for my lord to decide

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that, than for a judge who was not present at t
Certainly if any admission was made that t
sence of iron would be a detriment to the op
without confining that admission to its being
perfect mode of exhibiting the experimen
would otherwise be the case, that undoubtedly
be a ground for a nonsuit. But had it been
either that bituminous schistus deprived of iro
be made by a process known to ordinary c
of skill, or that it was a substance capable o
ordinarily purchased in the market as an ar
commerce, it would have been necessary t
shown the operation of separating the iron f
and if its presence in the bituminous schistus
positive detriment to the process of depriving th
of colour, then indeed the patent would fail.
all the circumstances, I quite concur in the vi
rest of the court have taken of the case, as w
the terms on which it ought to go to another ju

Rule for a new trial according

Sir *Frederick Pollock* applied for security fo
but the court held, that the cause was in too
stage to admit of that motion; *Parke* B. addin
if the defendants should obtain judgment agai
plaintiff, it might be enforced against him in
the country of which he was suggested to be a
bitant.

(a) This case was decided in *Easter* term 1835.

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HORSFORD *against* WEBSTER and DEACON.

The tenant of a farm being in arrear to his landlord at *Michaelmas* 1833, executed in *November*, to a creditor, a bill of sale of all his distrainable property, and also of certain grass or eddish growing on the farm. Just before the sale the landlord distrained, but his agent appeared at the sale, and suffered it to proceed, on the terms of paying to the landlord, in discharge of the rent due, the proceeds as well of the eddish, as of the other effects. The eddish being put up for sale as to be depastured till the 5th *April* next, he interposed, saying—"No, only till 25th *March*." The eddish was sold to the plaintiff, who put in his cattle to consume it, but the produce of the sale having left 40*l.* rent in arrear, the landlord distrained them there in *February*:—Held, *Parke* B. dissentiente, that, under the circumstances, a contract must be presumed by the landlord not to distrain the cattle thus put on the close to consume the eddish.

TRESPASS for seizing the plaintiff's cattle, and converting them to the defendants' use. Plea. general issue (*a*), not guilty. At the trial, before *Taunton* J. at the last *Northamptonshire* assizes, it appeared that at *Michaelmas* 1833, one *Kingston* was in arrear to Lord *Winchelsea* for the rent of a farm. On the following 1st *November* he executed a bill of sale, by which he assigned all his farming stock and goods, including some eatage or eddish, viz. grass then growing in a close, part of his farm, to the plaintiff, in payment of a debt due to him. Just before the sale was advertised, the landlord distrained for the rent in arrear, on all the property mentioned in the bill of sale, including the eatage. The auctioneer being called as a witness swore that the defendant *Webster* was present at the sale, in the character of agent to the landlord, and assented to its going on, if the whole proceeds were paid to the defendant *Deacon*, in liquidation of the rent distrained for. This being agreed to, the sale proceeded; and on the witness's declaring that the eatage would be sold with liberty to depasture it till the next 5th *April*, the defendant *Webster* said, "No, only till the 25th *March*," that being the time when *Kingston*'s term ended; and the plaintiff bought the eatage on the terms thus suggested. The proceeds were

(a) As the action related to a distress for rent on demised premises, the defendant pleaded the general issue, pursuant to 11 *Geo.* 2. c. 19. s. 21. as saved by 3 & 4 *Will.* 4. c. 42. s. 21. See *ante*, Vol. IV. 670.

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paid over to the defendant *Deacon*, according to the stipulation; but 40*l.* being still in arrear for rent, *Webster*, as agent of the landlord, distrained a second time for this sum in the following *February*, and took the plaintiff's cattle, while feeding on the eatage which he had bought at the sale. The learned judge being of opinion that the second distress was legal, nonsuited the plaintiff, giving him leave to move to enter a verdict for 17*l.*, the value of the beasts seized. A rule having been obtained accordingly,

Adams Serjt. and *Amos* showed cause. By the general rule of law a landlord may enter any part of the demised premises, and distrain for arrears of rent any goods found there, whether belonging to the tenant or a stranger (*a*). So far has this rule been carried, that cattle of a stranger put on land for the purpose of agistment there, have been held liable to distress by the landlord, though put there with his privity and consent; *Read* v. *Burley* (*b*). Even a grazier's cattle, on their road to market, which were put into a close to rest for a night, by assent of the landlord and licence of the tenant, have been held so liable; *Fowkes* v. *Joyce* (*c*). Now, in this case, the right to distrain has never been waived expressly, or by inference fairly deducible from any act of the landlord. Even had he improperly misled the plaintiff, his remedy would have been in equity. Had the tenant himself put cattle on the land to eat off the grass, nothing would have pre-

(*a*) See *Buckley* v. *Taylor*, 2 T. R. 601; 2 Br. & Bingh. 363; *Peacock* v. *Purvis*, Com. Dig. Distress (B. 1); 2 Bla. Com. 8.

(*b*) Cro. Eliz. 549. See *ante*, Vol. I. 317.

(*c*) 2 Ventris, 50; 2 Lutw. 1161; 3 Levinz. 260, *S. C.*; but the grazier was relieved in equity, on the ground of fraud in the landlord, 2 Vernon, 129, 131; Prec. Ch. 7; 2 Saund. 289 a. n. (7); Comyn's Landlord and Tenant, 2d edit. 388.

vented the landlord from distraining them. Then the plaintiff can be in no better situation than the tenant, in whose place he stands. The question is, whether this is a case of privilege from distress? and not whether a waiver of that right by the landlord would leave him without remedy.

Hill and *Waddington* supported the rule. The plaintiff, being a creditor of the tenant, took an assignment of his goods by bill of sale. Before the sale the landlord distrained them, but as he could not sell them till after five days had elapsed, he permitted them to be sold under the bill of sale, in order to obtain the proceeds earlier than he otherwise would have done. His agent's acts waived his right of distress as against the purchaser. It was a sufficient consideration for that waiver that he obtained by anticipation what he could not otherwise have done, the profits of the land up to 25th *March*. [Lord *Abinger* C. B. The landlord could not prevent the sale of the eddish, then what interest had he to consent to waive the distress?—*Parke* B. The landlord could not distrain the eddish, which, *quoad* his power of distress, must be considered as if it had been on another farm. But suppose that he, having no right to distrain, had recovered a judgment against his tenant, but had agreed with him not to proceed on it if he would pay him over the proceeds of the sale of the eddish, would that agreement have ousted his right to distrain subsequently? The sale of the eddish could not have taken place under the distress, and the landlord could not prevent its being sold under the plaintiff's bill of sale. The question is, whether he, by his bailiff, agreed to waive the right to distrain, in consideration of receiving the proceeds of that eddish. *Bolland* B. Not only does the landlord take by antici-

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pation the profits of the soil to 25th *March*, but also the cattle, rendered more valuable by the very eatage, the profits of which he had already received.] In *Fowkes* v. *Joyce*, it did not appear that the landlord got any advantage by putting the cattle on his land; his consent was, under the circumstances, held an indicium of fraud (*a*). *Tate* v. *Gleed* (*b*) is contrary to *Fowkes* v. *Joyce*, which is also impugned by Serjt. *Williams*, in his note to *Pool* v. *Longuevill* (*c*). Nor had the landlord, in that case, the consideration for forbearing to distrain, which in this case he has. The note to *Pool* v. *Longuevill* impugns that case, and shows that where cattle get into land from neglect of the tenant to repair fences, they cannot be distrained for rent due from him, though they have been levant and couchant: for the landlord shall not take advantage of his own wrong. As the landlord could not have acquired the proceeds of the eddish by any other arrangement, there was a sufficient consideration for the waiver of the right to distrain.

Lord ABINGER C. B.--I am of opinion that upon the evidence given, a contract by the landlord to waive his right of distraining cattle put on the close in question by the purchaser of the eatage, might properly be inferred. The plaintiff and the defendant are brought together at the auction, and by the consent of the defendant, on the part of the landlord, the sale is suffered to proceed on the terms of the landlord's receiving the proceeds not only of the goods distrained, but also of the eddish, which he could not have distrained, and the tenant had a right to sell. As the

(*a*) See *ante*, 410, n. (*c*), and the judgment of *Parke* B. *post*, 415.

(*b*) C. B. *Hil.* 24 *Geo.* 3; 3 Bla. C. 8. 15th edit.

(*c*) 2 Saund. 290.

landlord could not otherwise have obtained the purchase money of the eddish, I think that his having obtained it in the manner proved, affords a sufficient consideration upon which to imply a contract by him not to distrain cattle put in by the purchaser to consume that eddish. The true question is, whether on this state of facts there was not sufficient ground for a jury to infer that the purchaser understood from the defendant's declarations, that he should be allowed to enjoy the eddish in question if he bought it, and that the landlord had by his agent, the defendant, contracted that he would not deprive him of that enjoyment.

PARKE B. (a)—I am of opinion that this rule ought not to be made absolute; for if there was evidence from which a contract by the landlord not to distrain might be inferred, then as it appears that that question has never been submitted to a jury, the motion should have been for a new trial, and not to enter a verdict for the plaintiff. But I am also of opinion that no sufficient facts appeared, from which it could be presumed that such a contract was in fact made. I will consider the case as if it had arisen on the pleadings. The defendant was here entitled to plead the general issue under 11 *Geo.* 2. c. 19., but had he relied on the distress, in a special plea, what must the replication have been? The plaintiff's counsel has said that he must have replied a contract by the landlord, that in consideration that the plaintiff would pay over the purchase money of the eddish to him, he the landlord promised not to distrain the cattle put into the close for the purpose of depasturing it.

(a) The learned baron had inquired whether at the trial the judge was requested to leave the case to the jury, in order to their finding whether or not a contract by the landlord not to distrain, existed; and was answered in the negative.

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Now I do not see sufficient evidence to support such a replication. About 200*l.* being due for rent at *Michaelmas*, all the distrainable property of the tenant was taken under a distress. He had, however, previously executed to the plaintiff a bill of sale of those goods and also of certain eddish or grass on a close, part of his farm. When that sale was about to take place, the defendant, as agent to the landlord, interposed, saying in substance, that he would assent to the sale of the whole going on, notwithstanding the distress levied on part, provided the plaintiff would pay over the proceeds of the eddish, as well as of the other goods, in liquidation of the rent due. I cannot bring my mind to the conclusion, that this amounted to a waiver by the landlord of his right of distress; for it did not appear that either party then contemplated the necessity of distraining again. The transaction amounts to no more than an agreement by the landlord, claiming under his distress, to suffer a sale by the plaintiff's auctioneer under his bill of sale to proceed, on condition that the proceeds of a particular matter about to be sold, and upon which the distress did not attach, should be applied to the payment of a collateral debt due from the tenant to the landlord. There was no more right to distrain this eddish for rent in arrears than if the close on which it grew had formed part of another farm (*a*). Suppose the tenant had underlet a close on the farm, and the under-lessee and the landlord had agreed that the rent payable by the former should be applied to pay the rent due to the landlord from the immediate tenant, would that contract oust the landlord of his right to distrain? I am of opinion that there should be a new trial.

BOLLAND B.—I agree in opinion with my lord chief

(*a*) See 11 *Geo.* 2. c. 19. s. 8, 9.

baron. The question was clearly one of contract. The eddish of a field being put up for sale by the plaintiff, together with other property of the tenant which had been distrained, the defendant, as agent of the landlord, interposes by stating, that if the proceeds of that eddish are paid over in part liquidation of the rent, he will suffer the sale of the rest to proceed. That being agreed to, he further restricts the period within which the eddish should be consumed. It was thus held out to the purchaser that he would be allowed to take it in the only way he could, viz. by the mouths of his cattle, without distress by the landlord. In *Fowkes* v. *Joyce*, the cattle distrained had been placed in a close demised to an innkeeper with an inn, at which the drover had put up for the night on his way to the *London* market. One question there was, whether under the circumstances there was a privilege that the cattle should be unmolested there. It is obvious that there was no consideration to *Joyce* for the grant of any such privilege; but if he had agreed to take from the owner of the cattle, in part payment of rent due from the innkeeper, the money charged for taking them in to pasture, would not that have been a waiver of the right to distrain?

GURNEY B.—I concur with my lord chief baron and my brother *Bolland*. It appears to me that the landlord received the purchase money of the eddish, which he could not have obtained by his own distress, on the implied condition that he would suffer it to be consumed by the cattle of the purchaser without distraining them. The subsequent distress appears to me a breach of faith.

Rule absolute.

See *Wright and Another* v. *Dewes and Others*, 1 Adol. & Ell. 641.

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MOZLEY and Others *against* TINKLER.

The defendant sent to the plaintiffs the following letter signed by himself, but written by *B.*: "*F.* informs me that you are about publishing an arithmetic for him and another person, and I have no objection to being answerable as far as 50*l.* For my reference apply to *B.* & Co. of this place." *B.* attested defendant's signature thus: "Witness to *G. T.* (the defendant) *J. B.*" An action being brought on the guarantie, the plaintiffs did not prove that they gave the defendant notice that his guarantie was accepted, and that his solvency was deemed satisfactory: Held, that he could not recover.

ASSUMPSIT on a guarantie in a letter addressed to the plaintiffs, dated *Doncaster*, 5th *July* 1833, which was as follows:—"Mr. *France* informs me that you are about publishing an arithmetic for him and another person, and I have no objection to being answerable as far as 50*l.* For my reference apply to Messrs. *Brooke* & Co. of this place." (Signed) *George Tinkler*. Witness to Mr. *Tinkler*, *J. Brooke*." The pleas were, first, the general issue; nothing turned on the other pleas. At the last *Derbyshire* assizes, before *A. Park* J., it appeared that the plaintiffs were printers and publishers at *Derby*, and the defendant an innkeeper at *Doncaster*. One *France*, an accountant in *Doncaster*, called on the plaintiffs, in *June* 1833, requesting them to publish a work on arithmetic. They did not refuse to do so if he would find security for 50*l.*, which was about half the expense of printing. *France* named defendant as one who would be his security to that amount. Plaintiffs wrote to *Brooke*, a bookseller at *Doncaster*, for information as to defendant's responsibility. On 5th *July* 1833, *France* and defendant called on *Brooke*, bringing with them a guarantie which he had before written. He read it over to them, the defendant signed it, and *Brooke* witnessed the defendant's signature, attesting it in his own handwriting as above. The guarantie having been sent by *Brooke* to the plaintiffs, the printing was proceeded in to the amount of 100*l.*, and the bill for it, as well as 450 copies of the work, were delivered to *France*, who soon after became insolvent. Subsequently, *Cunningham*, a joint-editor of the work, applied to the plaintiffs for nine copies, and received the following answer:—"*Derby*, *October* 29th, 1833.

"Sir,—In answer to your's, we beg to state that we shall be very glad to supply you with the arithmetic, but considering that we must look to what we have in hand as our security, and also as Mr. *France* is the only person responsible to us for the payment, and we are responsible to him for what copies we part with, we must decline parting with any without having cash for them." (Signed by the plaintiffs.) "P. S. You say you are happy to find we are safe in the books already delivered. We do not know how we are safe, but assure you that we have not yet received any money from Mr. *France* or any one else."

It did not appear that the plaintiffs had communicated with the defendant after *Brooke* had sent them the guarantie, or that they had applied to *Brooke* according to its terms. It was thereupon objected that the plaintiffs must be nonsuited in the absence of proof of notice to the defendant that the guarantie was accepted by them with or without reference to *Brooke*, or that the defendant had consented to its being conclusive on him as such. *Mac Iver* v. *Richardson* (*a*), and *Symmonds* v. *Watt* (*b*), were cited. The learned judge gave leave to move to enter a nonsuit, and left the question of acceptance to the jury. Verdict for the plaintiffs. A rule having been obtained in last term, pursuant to the leave reserved,

(*a*) 1 Maule & S. 557.

(*b*) 2 Stark. C. N. P. 351; and see *Coleman* v. *Upcot*, 5 Viner's Ab. 527. *Bird* v. *Blosse*, 2 Vent. 361; *Hodgson* v. *Hutcheuson*, cor. Lord Keeper *Harcourt*, 1712. 5 Vin. 522. 1 *Evans's* Statutes, 236, n. 13, show that a proposal by letter, when acceded to by parol, is sufficient, though afterwards retracted, or again agreed to by parol declaration. A delivery of the note or memorandum of agreement to the maker's agent is sufficient, though not to the other party; 3 Atkyns, 503. 2 Chanc. R. 147. 1 Vernon, 116. See also *Moore* v. *Hart*, 2 Chanc. R. 284. 1 Vernon, 210. *Oxley* v. *Young*, 2 H. Bla. 613. *Gaunt* v. *Hill*, 1 Stark. C. N. P. 10. *Edgar* v. *Bluck*, 2 id. 475. *Brant* v. *Brown*, 3 B. & Cr. 668, 690. *Hawkins* v. *Warre*, 5 D. & R. 512.

forwarding the guarantie to the plaintiffs, and t
latter in procuring and accepting it. [*Parke* B. I
entering on the undertaking the plaintiffs were
satisfied of the defendant's solvency, but there
evidence that they ever communicated to him tha
were so satisfied.] Are not *Brooke*'s acts thei
this purpose? At all events his attestation of th
rantie as agent to the plaintiffs, and his afte
sending it to them, were evidence from which th
should infer, that the defendant had notice th
plaintiffs accepted and were satisfied with the gua
[*Parke* B. The defendant in fact said this:—"
give my guarantie provided you shall be satisfied
solvency." The very object of his letter was, th
plaintiffs might exercise their option. Even
Brooke's approval they had power, at their ow
cretion, to reject the guarantie. Then they
bound to prove that they had given him notic
they were satisfied with his solvency, and accept
guarantie. Lord *Abinger* C. B. Suppose the pl
to have made default in the printing, could *Fran*
sued them, alleging as a consideration that he ha
nished a satisfactory guarantie?]

Hill in support of the rule. The question is
ther there was a contract of guarantie binding
defendant, and if there was, then at what time? I

attached to it any character of guarantie. The distinction between an overture to a guarantie and a guarantie itself, perfected by assent of both parties, is clear. Thus in *Mac Iver* v. *Richardson* the question was, whether a complete contract of guarantie appeared on the paper produced? and Lord *Ellenborough* said, "This was only a proposition tending to a guarantie," and not a full and perfect guarantie until accepted by the other party. Here he was stopped by the court.

Lord ABINGER C. B.—The present case is one of express suspension of the intended contract of guarantie till something further should be done, and is therefore a much stronger in favor of the defendant than *Mac Iver* v. *Richardson*. The principle established in that case is, that where a proposal to guarantie a party from loss, by his giving credit to a third person, is made by letter in a manner which requires a reply, but receives none, that proposal cannot be tortured into a contract completed by assent of both parties. That case has been frequently acted on (*a*), and governs the present. We cannot say that the contract was complete till notice was given to the defendant. As to *Brooke*'s agency, nothing shows that the plaintiffs were bound by his opinion of the defendant's solvency, or that they might not have acted without regard to it.

PARKE B.—I am entirely of the same opinion. It is not necessary in contracts of this nature that all parties should be bound; it is sufficient if the party sued is proved to be liable. The defendant might be bound, if the plaintiffs provided the work and materials in fact, whether they were bound to provide them or not. The question here is, has the defendant entered into

(*a*) *Grant* v. *Hill*, 1 Stark. C. N. P. 10. *Symmonds* v. *Want*, 2 *id.* 371.

rantie. But the subsequent words show very c
that the defendant only intended to be bound ir
the plaintiffs, on inquiry, should be satisfied wi
solvency. Now there is no doubt, in point of law
that satisfaction being peculiarly within the plai
own knowledge, they were bound to prove that
acquainted the defendant with it. Such notice
have been averred in pleading; and in *Com. Di*
Pleader (C. 73), it is said, " In an action to deli
much corn, if the plaintiff approve of it at the fai
plaintiff ought to give notice if he approved of it
Then the plaintiffs ought to have proved that
gave the notice, for the whole matter arises not c
special pleas, but on the general issue. But it i
that *Brooke* being plaintiff's agent, his satisfa
which was known to the defendant, sufficiently inf
him of that of the plaintiffs; but *Brooke* might be
agent merely for obtaining the guarantie and inq
into the defendant's solvency; and what he did
his character of referee, by certifying his opinion
defendant to the plaintiffs, leaving it to them to r
whether he was solvent or not. After they had
up their minds on that subject they should ha
formed the defendant of the result; but as it i
proved that they did so, the rule must be abs

The other barons concurred.

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WILLIAMS *against* ROBERTS.

ASSUMPSIT for work and labour as an attorney. The bill was delivered on 28th *February* 1834. A summons to tax was taken out on 2d *March*, and attended on the 29th. An order to tax the bill was then made, and on the same day the plaintiff issued a writ to save his demand from the operation of the statute of limitations. This writ was returned *non est inventus* and entered of record. It was, however, sworn that the plaintiff and his clerks saw the defendant several times during the currency of the first writ, without making any attempt to serve him. Within a calendar month after the return, the plaintiff issued a second writ. *J. Jervis* obtained a rule to set aside the proceedings for irregularity, with costs, on two grounds; first, that when the first writ issued the proceedings were staid by summons; and secondly, that the defendant ought to have been served with the first before the second issued; 2 *Will.* 4. c. 39. s. 10. (*a*)

A summons to refer an attorney's bill for taxation, followed by a judge's order for that purpose, will not prevent the attorney from commencing an action on his bill, or operate as a stay of proceedings.

Since 2 & 3 *W.* 4, c. 39. s. 10. it is not necessary to serve, or endeavour to serve, a writ which is issued to avoid the effect of the statute of limitations; it is sufficient to return it non est inventus, and enter it of record.

(*a*) No writ issued by authority of this act shall be in force for more than four calendar months from the day of the date thereof, including the day of such date, but every writ of summons and capias may be continued by *alias* and *pluries*, as the case may require, if any defendant therein named may not have been arrested thereon or served therewith: Provided always, that no first writ shall be available to prevent the operation of any statute, whereby the time for the commencement of the action may be limited, unless the defendant shall be arrested thereon, or served therewith, or proceedings to or towards outlawry shall be had thereupon, or unless such writ, and every writ, (if any) issued in continuation of a preceding writ shall be returned non est inventus, and entered of record within one calendar month next after the expiration thereof, including the day of such expiration; and unless every writ issued in continuation of a preceding writ shall be issued within one such calendar month after the expiration of the preceding writ, and shall contain a memorandum indorsed thereon, or subscribed thereto, specifying the day of the date of the first writ;

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R. V. Richards showed cause. The summons was taken out, not in the action, but in a proceeding collateral to it, so that it could not operate as a stay of proceedings. On the other point, unless section 10 of 2 & 3 *Will.* 4. c. 39., renders necessary the service of process, which is only issued to keep alive the plaintiff's claims, the court will not compel the plaintiff to proceed at the hazard of reaping no benefit from his action. Before that section writs were issued in time to avoid the statute, upon which continuances might be entered at a subsequent time without any service being necessary. Since the act 2 & 3 *Will.* 4. c. 39., there are three modes of preventing the operation of the statute of limitations; first, arresting or serving the defendant with process; secondly, proceedings to outlawry on a return of *non est inventus* to bailable process; and thirdly, *returning* and entering on record the first writ of *non est inventus*. The plaintiff has taken the last course. The act does not direct service, its object being to enable the defendant to ascertain, by searching the records, whether the plaintiff, by issuing a writ, had prevented the effect of the statute of limitations; and that object has been here fulfilled.

J. Jervis contrà. The writ must be taken to have issued on the 29th, after the summons was disposed of by making the order to tax. That order, at all events, operated as a stay of proceedings if the summons did not; *Wells* v. *Secret* (*a*).

[Lord *Abinger* C. B. The order embodies no directions for a stay of proceedings, as it might have

such return to be made in bailable process by the sheriff, or other officer, to whom the writ shall be directed, or his successor in office, and in process not bailable by the plaintiff, or his attorney suing out the same, as the case may be.

(*a*) 2 Dowl. Pr. Ca. 447.

done under special circumstances. It stands a bare order to refer a bill to taxation, and does not stay proceedings. *Parke* B. The argument is correct with respect to summonses in a cause, but not in a collateral matter like the present. A summons to tax an attorney's bill is not a stay of proceedings before the undertaking and submission to pay what shall be found due, and the acceptance of that submission.]

On the second point, the act *2 & 3 Will.* 4. has altered the former practice by which plaintiffs might issue writs within the six years, without further proceedings on them at the time, though by entering up continuances they might at any time afterwards defeat the statute of limitations. For by the new statute writs are only in force for four months, and may be issued in succession. Unless they are served the defendant has no notice of them, and might be burdened with the plaintiff's costs of them. [*Parke* B. That is not a consequence which necessarily results, and is a different question. The master reports that such costs would not be allowed.] As bailable process must be delivered to the sheriff there must be a bonâ fide attempt to serve it, and if a contrary holding prevails as to serviceable process injustice will result. Thus one of two parties having cross-demands, may secretly issue a writ so as to enforce it after the six years have elapsed, and after the other party, relying on the operation of the statute of limitations on both debts, has not only forborne to sue till too late, but has lost his right of set-off.

Lord ABINGER C. B.—The first point has been very properly relinquished by the defendant's counsel, and with regard to the second, I am of opinion that the rule should be discharged. It is said that the statute 2 & 3 *Will.* 4. c. 39. s. 10., requires the proof that in

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order to prevent the statute of limitations from a taching, it must be shown that a writ issued with th object was actually served. Now the proviso in th section relates entirely to writs issued for the purpo of avoiding the statute of limitations, and is clearl and, in terms, distinct from the preceding part. I contains no words enacting that such a writ must b served, as well as returned non est inventus, an entered of record. The proviso intends that a plai tiff shall, in this case, continue that writ in fact at th end of every four months, which before the act h might at any time, by entering continuances (a), ha stated that he had done. The act may have also mea that by requiring an entry on record, the defend should be able to ascertain what writs had been iss against him. It appears that the plaintiff would liable to the expense of several writs if so issued (b)

PARKE B.—I am entirely of the same opinion. less the ordinary construction of an act leads t evident absurdity, or is repugnant to the decl intention of the legislature in passing it, we ca introduce any new words which would materially a it. No necessity here exists to add any such wo what the statute has accomplished is, to have that fact done by the plaintiff, which according to th former law was supposed to have been done by h when he entered continuances, but which never co have actually taken place. The proviso being susce tible of a sensible construction, must be read in the o dinary interpretation of the words which it contai We need not express any opinion whether it would ha

(a) See Tidd, 9th ed. 162, 679; and *Nicholson* v. *Lemon*, *ante*, Vol. IV 308.

(b) See *Dunn* v. *Harding*, 2 Dowl. P. C. 803. C. P.

been better that the legislature should have introduced into the proviso the words, "if he cannot be arrested or served therewith," as well as the immediately preceding clause.

Rule discharged with costs, as moved.

See Nicholson v. Lemon, ante, Vol. IV. 308; Ullock v. Lord Montford, id. 276; Dickenson v. Teague, id. 450.

ADAMS *against* BANKART and SAMUEL TUFFLEY BANKART.

One partner cannot bind another by submitting a partnership matter to arbitration, without express or implied authority for that purpose.

A judge has a discretion whether or not a witness shall be recalled after the party who called him has closed his case.

ASSUMPSIT on an award. The declaration stated that certain differences had arisen between the plaintiff and certain other persons heretofore his partners, to wit, one *J. Pares* and *J. Heygate*, since deceased, and the defendants, and that for putting an end to the same, the plaintiff and the said *J. P.* and *J. H.* and the defendants, submitted themselves to the award of one *Miles*. It then proceeded to state the award, the money counts, and a count on an account stated. Plea, the general issue. At the trial at the last *Leicestershire* assizes before *Taunton* J., *Miles* the arbitrator proved that the plaintiff, *Adams*, while in partnership with *Pares* and *Heygate* as woollen manufacturers, had furnished machinery to the defendants, and a dispute having arisen respecting it, he the witness undertook the reference at the request of *Pares* only, not having seen *Heygate* till after he had proceeded to act on the submission. He also said that the defendants were represented by their solicitor, *F. Bankart*, at the meetings, and never attended them

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personally, but the plaintiff did. The submission was by parol in 1828. The award was made in 1831. The plaintiff's case having been closed, it was objected for the defendants, that the submission of the plaintiff and *Heygate* to the reference not having been proved, the plaintiff must be nonsuited, on the ground that one partner could not bind another to submit to arbitration. The defendants' counsel denied that *Miles* the arbitrator had proved his having seen *Heygate* at all during the reference, nor did any such fact appear upon the judge's notes, when referred to. The plaintiff's counsel then suggested the recall of the witness in order to re-state what he had said on that subject, but the learned judge said, that unless the counsel for the defendant consented, he could not suffer a witness to be re-examined after it had been discovered where the shoe pinched, and for what particular point fresh evidence was requisite. The defendants' counsel having objected to the recall of the witness, the learned judge said that the plaintiff's attendance at the reference sufficiently proved his submission, and that the defendants must be bound by the acts of the attorney who acted for them; but the plaintiff was nonsuited, on the ground that no submission to the arbitration by *Heygate* appeared (*a*). In last *Michaelmas* term a rule was obtained for setting aside the nonsuit and having a new trial, on two grounds: first, that the judge refused to recall the witness at the instance of the plaintiff's counsel, saying he had no discretion to do so; secondly, that *Pares* might bind his co-partner by submission to the reference. The learned judge reported the evidence, adding, that when the objection was made he refused to recall the witness.

Goulburn Serjt. and *Mellor* (*Balguy* with them)

(*a*) *Keen* v. *Batshore*, 1 Esp. C. N. P. 195.

showed cause in this term as to the first point. The learned judge had a discretion whether or not to recall the witness, and exercised it. [*Parke* B. The rule was granted on our supposition that the learned judge declared that he could not recall the witness without the defendant's consent; but as that does not appear on the report, it must be taken that he exercised his discretion by refusing to permit him to be recalled. Lord *Abinger* C. B. It was clearly a matter of discretion with the learned judge, and he reports how he exercised it on objection made.] On the other point *Stead* v. *Salt* (a) is a distinct authority to show that one or more of several partners cannot bind the rest by submitting to an arbitration even of matters relating to the business carried on by the firm. *Best* C. J., in delivering the judgment of the court, says, "even in the case of a general partnership one of the partners cannot bind the other without an authority express or implied, and an authority can only be implied for what is necessary to carry on the trade in which the partners are concerned. Now to enter into a submission for arbitration is no part of the ordinary business of a trading firm, and there is nothing in the present case to show that either of the parties had authority to bind the others to such a submission." The submission in that case was by agreement in writing without deed. *Dilley* v. *Polhill* (b), *Ever* v. *Owen* (c), and *Brazier* v. *Jones* (d), show that where, in cases of submission by bond, the party in whose favour the award is made declares on it, and not on the bond, the submission of all parties must be proved by him, and not by the defendant. In *Dickinson* v. *Valpy* (e) it was held that an authority by a partner

(a) 3 Bingh. R. 101, 10 Moore, 889, *S. C.* See also *Sandeland* v. *Marsh*, 2 B. & Ald. 673.

(b) Stra. 923. (c) 7 B. & Cr. 427. (d) 8 B. & Cr. 124.

(e) 10 B. & Cr. 128.

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to draw bills for the firm of which he is a member, only exists where it is necessary for the purpose of carrying on the business of a trading company. *Parke* J. said, "Now undoubtedly, if there is a complete partnership between two or more persons, one partner does communicate to the other, standing in the relation of complete partner, all authorities necessary for carrying on the partnership, and all authorities usually exercised by partners in the course of that dealing in which they are engaged." The authority to submit to a reference cannot be considered to be such a requisite for carrying on the affairs of a trading partnership, as would not require express proof of having been conferred by the whole firm on one or more members of it.

Hill and *Humfrey* contrà. The learned judge asked the leading counsel for one of the defendants, whether he, the judge, should ask the witness *Miles* the question suggested. [*Parke* B. The rule was granted on this point, on its having been stated that the learned judge thought he had no discretion to recall the witness without the consent of the defendants' counsel; and it was therefore supposed by us that the discretion inherent in a judge to recall a witness or not had not been exercised by him. But from the report it must be taken that he exercised his discretion. Lord *Abinger* C. B. The judge had clearly a discretion, which he exercised by refusing to recall the witness when the defendants' counsel objected; had he offered to recall him if consent was given on the defendants' part, it might have been otherwise.] The second point, whether a general partner can bind his co-partners by a parol submission to arbitration, appears an open question. The following are instances in which a partner has power to bind the firm: he may release a debt after it is sued for by the firm, and may stay their proceedings in the action

he may give a notice to quit, guarantie payment by a third person, or give a note for sixpences under the Lords' act, 32 *Geo.* 2. c. 28. s. 13. So, in bankruptcy, he may sue out a fiat for the firm, vote for assignees, and sign the bankrupt's certificate; he may receive a debt due to the firm and discharge the debtor. He might also pay a partnership debt; it is difficult therefore to perceive why he should not also have power to refer to arbitration a claim on the firm. [Lord *Abinger* C. B. If one partner chose to pay a debt which the rest do not acknowledge to be due, they may, as between themselves, dispute the propriety of that payment. *Parke* B. In this case the attempt is to burden the firm with a fresh liability, viz. the entering into a contract to submit to arbitration and abiding by the event of it.] It is anomalous that a partner who may bind a firm by contracting, and making payments on account of it, should not be competent to take the steps of referring it to arbitration, to ascertain the amount of liability of the firm under it. The policy of the legislature appears from the late act 2 & 3 *Will.* 4. c. 42, which is to encourage arbitrations. [Lord *Abinger* C. B. I have always considered policy to be the ultima ratio by which judges should be guided (*a*). If, indeed, they should be destitute of decisions and principles of law applicable to the subject, they must then attempt, by the imperfect light of their own reason, to discover and lay down such rules as they may think useful for the public.] *Stead* v. *Salt* was the case of a partnership in a particular transaction, and not of a general partnership, as in this case; and at nisi prius *Bayley* J. rested his opinion on that distinction. *Stringford* v. *Green* (*b*) appears to have been an action

(*a*) And see 2 Adol. & Ell. 105, *et seq.*

(*b*) 2 Mod. 228. As to this case, see 2 Adol. & Ell. 197, *et seq.*

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on an award not under seal against the person wh had signed an arbitration bond alone. The court then said, the defendant may undertake for his partner (a) [Lord *Abinger* C. B. The court held, not that the undertaking of one to refer would bind his co-partner but himself if the latter refused. Another objection existed in that case, that one partner cannot bind another by deed; the reason being, that if he could it would extend to mortgages, and enable him to give a favourite creditor a real lien on the estates of the other partners; *Harrison* v. *Jackson* (b).]

Lord ABINGER C. B.—The whole argument for th plaintiff rests on the distinction between a gener partnership and a partnership for a particular tran action only, upon which Mr. Justice *Bayley* is reporte to have acted at the trial of *Stead* v. *Salt*. But nothin in that case turned upon the circumstance that th partnership was for a particular transaction only; and think that *Stead* v. *Salt* is in point to show, that on partner cannot bind another by agreeing to submit partnership matter to arbitration without his assent. do not hold it requisite that that assent should b couched in any particular formula of words, or that should be signed by the partners; but some evidenc must be given, from which an actual authority may b presumed to have been conferred by him. It cann be said to be a matter of necessity arising out of th relation in which they stand to each other as partner that any one of them should submit a claim of the fir

(a) But they added, "and having engaged for him and promised th he should perform the award on his part, (*notwithstanding the partner is bound so to do*) yet if he refuse, it is a breach of the defendant's promise."

(a) Per Lord *Kenyon*, 7 T. R. 207.

to arbitration. Then no such authority can be inferred.

PARKE B.—I am entirely of the same opinion. It is clear that the authority of one partner to bind another, by submitting a partnership matter to arbitration, does not necessarily arise from their relation as partners. That appears from *Stead* v. *Salt*. Then it must be proved like any other authority, either by express evidence of deed or writing, or by proof of circumstances from which the inference that it was so given may fairly be drawn.

The other Barons concurring (*a*), the rule was about to be discharged; but it being stated that the plaintiffs were taken by surprise at the trial, the court, by arrangement between the counsel, and in order to prevent a fresh action, made the rule absolute on payment of costs.

(*a*) *Gurney* B. was gone to chambers.

In re Estate and Effects of BARWICK.

A rule to show cause granted on 42 *G*. 3. c. 99. s. 2., calling on an executor to account to the Commissioners of Stamps for the testator's personalty. That rule was served on the executor, but after repeated attempts to serve him with the rule absolute, the service could not be effected. The court, on a very strong affidavit of the facts, granted a rule nisi for an attachment, unless cause was shown in eight days, directing that rule to be served personally.

A Rule calling on the executor of *Barwick* to show cause why he should not deliver to the commissioners of stamps an account on oath of the personalty of the deceased, had been granted under *42 Geo. 3.* c. 99. s. 2., and having been served on the executor, was

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made absolute. Repeated attempts to serve the absolute were made without success, and *Amos* applied for a rule nisi for an attachment, making absolute unless cause was shown in eight days. on reading his affidavits, which disclosed a very st case of attempts to serve the executor, who av the service, the court granted the rule as prayed recting it to be served personally.

BERESFORD, Clerk, *against* NEWTON, ANDERDON, Others.

The rector of a parish situate partly in the city of *London*, and partly in the county of *Middlesex*, filed a bill against the occupiers of certain houses situate within the *Middlesex* part of the parish, for payment by them as occupiers or tenants of the said houses respectively, of certain sums which they, as

A BILL had been filed by the plaintiff to ol payment of certain ancient customary payn claimed to be due to him as rector of the parish o *Andrew, Holborn*, in respect of certain houses in part of the parish which is situate in *Middlesex*, occupied by the several defendants. The bill alle that part of the profits or dues which the recto the time being was, and by custom and usage time immemorial had been, entitled to receive and arose from ancient customary payments made by tenants or occupiers of houses within the parish in of tithes; the greater portion of which payments, ing sums certain, were made for and in respect of

such occupiers or tenants of the said houses respectively, were by ancient cust usage, time out of mind, bound to pay to such rector in lieu of tithes, an The time when the sites occupied by the houses were first built on did no tinctly appear, but it was proved that for 100 years past the successive occupi these particular houses had uniformly paid to the rector for the time being, c specified and invariable sums in respect of each house. Payments of this n were not general throughout the *Middlesex* part of the parish, nor were they ch from houses on new sites. The sums paid by each respective house were diff and did not appear to bear any distinct rate or proportion to the values t particular houses *inter se*. Held, that the proper inference from these facts that the payments claimed had been made from time immemorial, and, consequ that they were legally recoverable; not only because a legal origin could, in a ways, be suggested for them, but also with reference to a repeated series of deci establishing similar payments under circumstances resembling those before the

house by the tenant or occupier thereof, and all which payments were due to the rector for the time being, and were called and in lieu of tithes, and as such had been from time to time received by his predecessors. It proceeded to allege that the defendants were inhabitants of the parish, and had since 1824 occupied certain houses within that part of the parish situated in the county of *Middlesex*, and that the defendant, as occupiers or tenants of the said houses respectively, were by *ancient custom or usage time out of mind* bound to pay to such rector, in lieu of tithes, the following sums annually; to wit, the defendant *Newton* the sum of 18*s*., the defendant *Anderdon*, 16*s*., the defendant *S.* 10*s*. &c. (naming each defendant and the sum due,) and which payments the former occupiers or tenants of the said houses respectively had, in respect of such houses, immemorially paid to the rector of the said parish for the time being, and that the defendants ought, as such former occupiers or tenants did or ought to have done, to pay such sums to the plaintiff. The case having been argued at the *Gray's Inn* equity sittings after last *Trinity* term, before *Alderson* B. by *Boteler*, *Beames*, and *James*, for the plaintiff, and by Sir *Charles Wetherell*, *Swanston*, *O. Anderdon*, and *Younge*, for the defendants, the learned baron took time to consider his judgment, and afterwards, in last *Michaelmas* term, desired that previous to the final decree being pronounced in the matter, the opinion of the whole court might be taken on certain points, which he stated for their judgment in the following manner(*a*):—The plaintiff was admitted to be the rector of the whole parish of *St. Andrew, Holborn*, which is partly in the city of *London* and partly in the county of *Middlesex*. The de-

(*a*) The learned baron stated on the argument before the full court, that he did not intend that this statement should conclude him as to the facts, but that it should be a guide to him in dealing with the evidence afterwards.

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fendants were admitted to be respectively occupiers of certain houses situate in that part of the parish which is within the county of *Middlesex*. There was no distinct evidence showing when the sites of the particular houses which are now occupied by the defendants were first built upon. As far back as living memory went, and by documentary evidence as far back as one hundred years last past and upwards, the successive occupiers of these particular houses have uniformly paid to the rector for the time being of this parish, certain specified and invariable sums in respect of each house. These sums were not paid for *Easter* dues, a distinct and separate account for *Easter* dues having been uniformly kept in the ancient rector's books, which were produced in evidence. The sums paid by each respective house were different, and did not appear to bear any distinct rate or proportion to the values of the particular houses *inter se*. It was proved that these payments were by no means general through this part of the parish, and that no houses newly erected on new sites ever paid any thing to the rector. The amount paid, if taken with reference to the value of the land on which these houses stand, would plainly be excessive, if taken as a modus for such land as land in the reign of *Richard* the First.

The first question for the opinion of the court was, Whether, from or under the above circumstances, the court ought to infer that there were from time immemorial customary payments made by the respective occupiers there in respect of these particular houses, or from houses built on the same sites, existing from time immemorial; and, if so, whether such payments could have had a legal origin, and can still be enforced by the plaintiff as rector of the parish?

The second question is, Whether, in case such payments have not existed from time immemorial, but are

ancient customary payments, they can still be legally enforced by the plaintiff as rector of the parish?

Boteler for the rector. Payments of this kind, and exceeding these in amount, have been frequently claimed in *London* and its neighbourhood, and enforced by repeated decrees of this court; and if so, the plaintiff is entitled to judgment. *Umfreville* v. *Hodges* (a), was the case of a claim of as large a payment as any now claimed: viz. 18*s.* for a house out of the city of *London*. The jury found in terms, that there was a "modus" of 18*s.* a-year payable for the tithes of a house situate in that part of the parish of *St. Botolph without Aldgate*, which lay in *Middlesex*, to be paid by 4*s.* 6*d.* a quarter, and the court decreed in favour of the payment. Again, in *Umfreville* v. *Topping* (b), a payment of 20*l.* a-year was claimed for tithes, or customary payments in lieu of them, for *Hooker's Rents*, which is a place in the *Middlesex* part of *St. Botolph's*. No decree appears, but a "*modus*" of 5*l.* a quarter was shortly after decreed to be paid in respect of the same *Hooker's Rents* on the same evidence; *Umfreville* v. *Campion* (c). In *Kynaston* v. *Hattersley* (d) a payment of 20*s.* a-year in lieu of tithes for a house in *East Smithfield*, in the *Middlesex* part of the same parish, was decreed on evidence similar to the present, though it was objected in the answer that no tithes were due of common right. In *Kynaston* v. *Hawley* (e) a payment of 3*l.* a-year claimed for a new house similarly situated, was

(a) 1 Wood's Tithe Decrees, 253; *S. C.* 1 Eagle & Y. 553. He also cited *Umfreville* v. *Vanderdock*, relating to *St. Botolph's* parish, but not reported in the decree book, 8th *April*, *Easter*, 22 *Car.* 2.

(b) 3 Wood's D. 12, n.; 2 Eagle & Y. 184, *S. C.*

(c) 6 *W. & M.*; 1 Wood's D. 329, n.; 1 Eagle & Y. 591.

(d) 3 Wood's D. 9; 2 E. & Y. 183.

(e) 3 Wood, 135.

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decreed to be due to the impropriator of that parish, as payable from time immemorial in lieu of tithes of the land on which the brewhouse was built. [Lord *Abinger* C. B. Does any thing in that case show the date of its erection?] Nothing. [*Alderson* B. The defence was, that the brewhouse was built on lands of a monastery dissolved by 31 *H.* 8.] The above cases show that immemorial payments claimed in lieu of tithes for houses, and of larger amount than the present, have been enforced as legal. The instances of suits of this nature are not confined to *St. Botolph's*, but they occur in other parishes round *London*, viz. *St. Mary Magdalen*, *Bermondsey*, as well as *St. Martin's-le-Grand*, *St. Olave's Southwark* (*a*), and *St. Dunstan's*. It appears from the decree book that another decree was made respecting *Bermondsey* parish on 13th *Nov.* 1657, in a cause of *Whittaker* v. *Rosewell and Strong* (*b*), by which the first named defendant was decreed to pay 26*s.* a-year, and the other defendant 20*s.*, as different sums by way of compositions in lieu of tithes of their respective houses, and of the ground whereon they were built, without regard to their value. The answer had relied on these payments being voluntary, and not in lieu of tithes, nor had the payment been laid as immemorial. A decree in *Whitaker* v. *Lane, Allen and others*, is found in the decree book, dated 5th *May* 1659. Certain yearly payments were there enforced, having been claimed by usage time out of mind, and for many years together, for and in lieu of tithes. *Heath* v. *Sandford and another* (*c*), was a claim by the rector of the same parish of 5*s.* a-year, time out of mind paid in lieu of tithes for the houses respectively occupied by the defendants in *Dockhead*, and the payment

(*a*) *Hill* v. *Humble*; decree 14th *July* 1762. Not reported.

(*b*) Not reported. (*c*) 1 Wood's D. 427. 30 *June*, 2 *Ann.* 1703.

was decreed without regard to the rent or value of the houses. [Lord *Abinger* C. B. The doubt is, on what principle those decisions were founded.] Either on the immemorial, or at least, very ancient existence of the payments decreed for, all of them being claimed to be in lieu of tithes. Dr. *Graunt*'s case (*a*) is one. There is another class of cases where customary payments of so much in the pound on every 20*s*. rent of a mansion, shop, &c. occupied by a parishioner or inhabitant, have been supported as being in the nature of tithes, viz. a modus decimandi. It is now too late to declare such payments illegal. [Lord *Abinger* C. B. Might not a party who contemplated the improvement of his land by building on it, agree with the incumbent to fix on the rent of one of the houses about to be built, a sum to be paid by way of composition for the whole, or at least for a much larger portion of the land about to be built on, so as to exonerate the rest? That may deserve attention in considering the question of legal origin.] As the incumbent would have been without provision in parishes where houses were not titheable, the original agreement for these payments may have had its origin in that circumstance, or in a composition for personal tithes otherwise payable. [*Alderson* B. What is the meaning of the word "custom" in the cases which decide that tithes are not payable for houses, except by custom (*b*). Custom has in

(a) 11 Co. 15; 1 Eagle & Y. 222. Amount, 2*s*. in the pound on every 20*s*. rent; but see as to this case, 1 Rol. Ab. 642; Hobart's R. 10. *Leyfield* v. *Tydale*. *Boteler* also mentioned that similar payments had been enforced at *Canterbury*, *Norwich*, and *Winchelsea*; and that in a late suit in this court, claiming 2*s*. in the pound on certain houses and rents of land at *Battle*, Lord *Lyndhurst* had directed an issue to try the modus, intimating that the plaintiff had established his claim. The defendant submitted to pay in future, each party paying his own costs.

(b) See last note. Also *Clarke* v. *Prowse*, Latch's R. 10; *Anon*. Cro. Car. 596; Bac. Ab. tit. Tythes (A); 2 Inst. 659, &c.

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general been considered as a local matter, but a custom to pay tithes may be a parochial usage, or a charge on the occupiers of a particular house; in the latter case it is a prescription, and would be incorrectly stated as a custom (a). The term has however been used in the statute of tithes 2 & 3 *Ed.* 6. c. 13., without confining it to its common law meaning of a local usage; for section one directs that tithes are to be paid "in such manner and form as has been of right yielded and paid within forty years next before the making of this act, or of right or custom ought to have been paid.] That act does not extend to the inhabitants of the cities of *London* and *Canterbury*, and the suburbs thereof, or to any other town or place that has used to pay their tithes by their houses; section 12. [Lord *Abinger* C. B. That gives you a clear right to refer this payment to a period antecedent to that time.] As the frame of the plaintiff's bill and his evidence bring this payment within the decisions which have been cited, its legality cannot now be questioned.

Sir *Charles Wetherell* for the defendants. The bill does not state any custom of payment with certainty. It does not claim a payment for a house and soil as for tithe of land, but only in respect of the occupation of each house. It is not alleged that a large sum, which was originally levied by contribution of holders of a district of land, was afterwards subdivided among the occupiers of certain houses built upon it; but a general allegation of custom for occupiers of houses to pay these sums in lieu of tithes is stated. Then, as a general custom to that effect must be proved as laid, it will not be sufficient to show that occupiers of parti-

(a) See 1 Inst. 113, b.; 4 Rep. 31, b.; 6 Id. 60; 1 B. & Ald. 357.

cular houses paid sums in lieu of tithes. There is accordingly no analogy between these payments and those of 2s. 9d. in the pound imposed by 37 *Hen.* 8. c. 12. on the rent of houses in *London*; for what may be a binding custom in that city as lex loci, has no such effect out of it. The payments commonly made in *London* and other towns, are improperly called tithes, being of a different kind from them, as well as from payments made under a common law custom, as by prescription in lieu of tithes (*a*). These payments in *London* were never measured by land occupied; they never represented tithes, or were made in respect of any modus or composition for them known to the law, but were introduced in times of catholic ascendancy as payments for ecclesiastical duties performed on *Sundays* and holidays, and were cut down to 2s. 9d. in the pound on the yearly rent by 37 *Hen.* 8. c. 12 (*b*). Payments which may be due in the *London* part of this parish cannot affect that portion of it which is in *Middlesex*, by reason of vicinage only. *St. Martin's-le-Grand*, though locally within *London*, yet, not being part of it, is unaffected by the decree annexed to 37 *Hen.* 8. for payment of tithes in *London*. Cases in which the municipal payment has been in fact extended out of the city, should be looked on with great suspicion, as encroachments originating in similitude merely. Though payment in lieu of tithe may possibly be claimable for a house under particular circumstances, this modus cannot be supported upon this state of facts. It need not be contended that in no state of things can tithe be claimed for a house, or, more correctly speaking, for a piece of land covered with a house; for, in support

(a) See cases, Eagle on Tithes, 443.

(b) *Macdougall* v. *Purrier*, 2 Dow & Clark's Rep. Dom. Proc.; *S. C.* 4 Bligh, 434; also Mr. *Tyrwhitt*'s Observations on that case annexed to his Report of it, printed by the Common Council of the City of *London* in 1833.

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of such a payment, a composition made before time of memory for the tithe going with a particular house may be proved, or its origin legally presumed. So it might be good as a species of farm modus, where a man agrees that a house with a piece of land attached shall pay a certain sum: for in that case the tithe is in reality paid for the land, *Travis* v. *Oxton* (*a*). The payment made does not resemble a district modus or rate contributed to by the inhabitants of a certain ambit, among whom it is divided, but is insulated for each house; it is not computed with any reference to its value, or to its proportion to the value of other houses in the parish taken together or separately; nor does it go to make up any sum imposed on occupiers of houses in the district, as an aliquot part of that sum. Again, these payments are by no means general throughout the *Middlesex* part of the parish, nor do houses on new sites pay them. That precludes the possibility of tithe due from a given area of the parish having been divided by owners of subdivided portions into the specific payments claimed. No method can be suggested by which the original division took place; nor are these payments analogous to personal tithes, for houses are not capable of annual renewal. Again, how can personal tithes, arising in respect of personal labour of successive occupiers, be annexed to particular houses? If, by agreement between ordinary, patron, rector, and house-owner, they might, it is improbable that they would; for the latter would thus fix a burden on his property which might either never become due, or at least would be at an end if the house was destroyed by fire, want of repairs, &c. Again, this payment is charged, not as a rent-charge on the premises, but as a payment to be made by the occupier of the pr

(*a*) Gwill. 1684. 1 Inst. 159, a. *n.* (4.) 17th ed. 3 Eagle & Y. 1248

ticular house; so that if a house was destroyed or ceased to be occupied, the payment for it could not be recovered by any other occupier. Then as a modus or substitution for tithe it is illegal and bad, being uncertain as to its duration; *Bennett* v. *Read* (a), *Gresham's* case (b). Then no reasonable origin can be presumed from such a payment, if the titheable matter may be destroyed by the act of the occupier, without power by the rector to claim any thing in that event. Here no titheable matter exists for which these payments claimed can be shown to have been substituted for the tithes; but every case which has been cited shows, that without proving such a titheable matter to have existed, no custom for any such payment can be presumed to have been reared on it. Rankness is another objection to these payments. [*Alderson* B. Undoubtedly, if they are taken to be as a modus in lieu of tithe of land only.]

Boteler in reply. Whether the plaintiff calls the payments claimed tithes, oblations, or rates, is immaterial, as the term, "tithes" has been adopted in these cases by the courts. The whole course of the decisions is in favour of the rector. The origin of the payment in *London* and the adjoining parts of *Middlesex* would in all probability be the same, viz. a substitution for personal tithes. Similar payments have been enforced in other parts of the kingdom.

Lord ABINGER C. B.—The first question to be decided is, whether or not, under the circumstances stated, there is ground for us to infer that by custom existing from time immemorial, these payments were made to the incumbent of *St. Andrew's, Holborn*, by

(a) 1 Austruther's R. 322.

(b) Cro. Eliz. 139, and 3 Burn's Ecc. Law by *Tyrwhitt*, 455, note.

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the respective occupiers of the houses described in the bill. Upon that point I have personally no doubt that sufficient ground appears to justify that inference. The evidence shows that for more than 100 years the occupiers of these houses have made these customary payments. Now though it would be a question for a jury to say whether an usage of that duration, standing alone without explanation, or contradiction by other facts, was or was not immemorial, I cannot presume that they would do otherwise than draw the true inference from that state of evidence, viz. that the usage was immemorial. As to the second question, whether such payments could have had a legal origin, we should be doing great violence to the many decisions which have established payments of this description to be legal, if we were now to overturn them all because we cannot with certainty point out a legal origin for them. Surely it is the duty of courts of justice rather to endeavour to find out grounds for supporting a long series of former decisions, than to try to discover new lights in order to overturn them. I should say, that after repeated decisions of the competent tribunals on a particular subject-matter which has remained unimpeached for many years, and as such have afforded foundation for usage resting upon them, courts of justice can hardly be called on to suggest any legal origin for the payments which have been so often upheld by their decrees. The decisions themselves afford sufficient grounds for our judgment (a); however, if called upon to suggest a legal origin for these payments, I think, first, that we may resort to any reasonable intendment in support of them; and next, that the several ways in which they may legally have origi

(a) See Ambler, 10, 11. Prec. in Ch. 461. Hargrave's Co. Lit. Co. Lit. 24 b.

First, it is provided generally by *27 Hen.* 8. c. 20. that all tithes should be paid according to the ecclesiastical laws and ordinances of the church of *England*, and after the laudable *usages and customs* of the parish or place where the party dwelt. Stat. 2 & 3 *Edw.* 6. c. 13. next introduced several variations and useful modifications in the laws of tithes, providing, among others, by s. 7., "that every person exercising merchandizes, bargaining and selling clothing, handicraft, or other art or faculty, being such kind of persons and in such places as heretofore *within these forty years have accustomably* used to pay such personal tithes, or of right ought to pay, (other than such as have been day labourers) shall yearly, at or before the feast of *Easter*, pay for his personal tithes," &c. The expression "have accustomably been used to pay" is applicable to all cases where personal tithes had been paid. The 11th section sanctions the payment of the customary tithe of fish, and speaks of the parish. The 12th section speaks of the payment by the inhabitants of *London* and *Canterbury*, and the suburbs of the same: "Provided always, and be it enacted by the authority aforesaid, that this act, or any thing herein contained &c., shall not extend in anywise to the inhabitants of the cities of *London* and *Canterbury*, and suburbs of same, nor to any other town or place that hath used to pay their tithes by their houses, otherwise than they ought or should have done before the making of this act." Now suppose that before the making of that act an agreement had been made in fact, whether exactly grounded on the existing law or not, that certain houses in the suburbs of the city of *London*, viz. in the parish here spoken of, *St. Andrew's, Holborn*, should pay certain specific sums for their tithes, and that all the other houses in that suburb and part of the parish should be discharged. And suppose that agreement

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to have been acted upon for forty years, would not the effect of this statute be to confirm the payment so stipulated for? Suppose, first, that it had no legal origin, and that it had been acted on for 40, 50, or 100 years—suppose, as we are at liberty to do, that the whole of this parish which is situate out of the city of *London* had been in the hands of one or two persons, who, while there were only a few houses built, had made a bargain with the incumbent or proper authorities for the time being, that in consideration of certain houses then existing within the parish, paying certain specific sums, which we will suppose of much larger amount than they would be liable to pay upon any footing of a tithe applicable to them or their sites, that then any new inhabitants who might come to reside in new houses afterwards to be built as the population might increase, should be exempted from personal tithes; (not from prædial tithes as long as the land should be cultivated). Then if that bargain had been acted upon for 40 years the result would be, that this statute would apply to it, and the occupiers of those newly-built houses would have the benefit of exemption from all personal tithes within that district, which had been before accustomed to pay personal tithes, by reason of the owners of the houses then existing having submitted to a much larger payment than those houses on their sites would otherwise have been liable to pay? I think we need not look to the origin of the transaction, if, in point of fact, it might have existed 40 years before the passing of the statute of *Edw.* 6. If it had existed so long, then the statute has the effect of declaring that parties shall not pay personal tithes if they have not paid them for the last 40 years; but if they have been accustomed to pay personal tithes they shall continue to do so. I quite agree that a house, quâ house, is not liable to pay tithes at all; but I should go further. I can sug-

gest a case where such a composition would be perfectly good. Suppose an owner of land, paying prædial tithes for it, to intend to cover it with buildings, in which state no tithes are payable for it, but during the progress of the building, the part not covered is liable to pay tithes for such matters as it produces; is there any thing unreasonable in the owner of that land saying to the rector, patron, and ordinary, "I am now going to dedicate my lands to purposes which in the event will probably destroy all your tithes; but I offer to enter into this arrangement with you: if you will take for the first eight or ten houses that I build, one fixed and specific payment, according to the different annual value of the houses, and exonerate the remainder of the land from tithes so long as it remains unbuilt on, those payments shall be made to you perpetually, as long as those houses are occupied?" Sir *Charles Wetherell* has asked with great ingenuity, what becomes of the modus when the houses have ceased to be occupied, and where is the consideration for it? The answer is, that when all the rest of the land is built on, ex hypothesi, the incumbent would be entitled to no tithes at all for it, and therefore would not make a bad bargain in taking the chance of those payments from the existing houses during all the time they were occupied in lieu of all the tithes claimed for their sites, and as a perpetual payment in lieu of the prædial tithes, which, should the rest of the land be subsequently built on, he could not afterwards claim. If the houses were all burnt, then the foundation of the argument is gone; if the land goes back into a state of cultivation, the original right to prædial tithes or small tithes is revived. So long as the land is covered with the buildings, so that the incumbent can get no tithes from it, he has made a good bargain. I suggest that is the origin of a custom, that as long as certain houses were occupied

not see any objection to it in point of law. w
firming that such was the fact, I suggest
case which occurred to me in regard to th
payment; and if any possible case can be sugg
court is bound to adopt it, in order to sup
ments that have been allowed above one hund
and sanctioned by so many decisions of cour
tice, especially of this court. I remember
question before Lord *Kenyon* respecting t
of a usage of 60 or 70 years, and his lordshi
tically said, "I will presume an act of parli
sanction the usage of 100 years (*a*)." Howev
that presumption may be, it shows his stron
as to how far a court would go to sanction a
usage; and when I recollect how many varie
of property must depend on usage, and consid
this instance we are asked to disturb a an
existing right which has lasted for a centur
it is not too much to resort to and adopt any
suggestion for the purpose of supporting i
pears to me that I have suggested in this
state of things very likely to have occurred to
the usage; others, which might equally sanct
have in fact occasioned it. I think, therefore
presume a legal origin to it. Whether these
are called a composition or modus for tithes, o
other name, they appear to be ancient, and I t

they have been made from time immemorial for these particular houses, or for houses preceding them on the same sites. We ought therefore to sustain them.

PARKE B.—I am entirely of the same opinion. The first question which is proposed for our consideration is, whether, under the circumstances stated in the case, the court ought to infer that these were customary payments made by the respective occupiers of houses in respect of these particular houses or of houses built on the same site, existing from time immemorial. These payments appear to have been made as far back as living memory goes, and the documentary evidence shows the houses to have existed for a period of 100 years. Upon these facts, I think, we are not only warranted but bound to infer every thing requisite to give a legal origin to such payments, so as to establish these rights, unless something in the case should convince us that the circumstances requisite to give it a legal origin did not occur. Further, if it is necessary in this case to infer the immemoriality of the existence of the houses, and of the payments by their occupiers, I think it is the duty of the court to do so; and it is on that foundation that immemorial exemptions from, as well as rights to payments, are supported in all cases which are tried by juries. I have, therefore, no doubt at all in answering the first question.

With respect to the second part of it, I had some little doubt, in the progress of the inquiry, whether we could attribute a legal origin to the payment. We certainly are bound to do so if we can, for many decisions of different courts have been cited, in which decrees have been made enforcing payments of this kind against the inhabitants of particular houses, and not extending through a particular district. Now it occurred to me in the course of the inquiry, without

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adverting to what was said by Lord *Abinger* as to the construction of the statutes of *Hen.* 8 and *Edw.* 6., that a reasonable and legal origin for these payments might be presumed in this way:—Suppose an agreement to have been made before the time of legal memory between the parson, patron, and ordinary, on the one side, and the inhabitants on the other, (who at that time were bound to pay personal tithes,) that they should ever after be exempt from the payment of them, on condition that the tenants of certain then existing houses, and all subsequent tenants of those houses, and of all houses erected on their sites, should pay a certain pecuniary composition in respect of each house,—that would have been a perfectly good modus. I was not aware at that time that it was contended that the inhabitants and occupiers of sites of houses, not being at that time occupied as dwelling-houses, were exempt from the payment of this legal modus or prescriptive payment; but if they were, that certainly shows that my hypothesis could not be supported: for, in order to sustain that particular modus, it would be necessary to assign to the incumbent some permanent payment in lieu of the tithes which he was entitled to by custom from all the existing inhabitants; but it would not have been a permanent payment if they had only paid during the occupation. There is, however, another supposition of a similar kind, which, it appears to me, would be perfectly good. Suppose that there was immemorially, before time of legal memory, a composition entered into between the patron, and parson, and ordinary, and the inhabitants of certain particular houses, that the inhabitants of those particular houses should be exempt from the payment of all personal tithes, on their paying so much per house in lieu of those personal tithes,—that would be a good modus, as they would only be bound to pay as long as they were tenants of the

houses, and the modus would be a satisfaction of the personal tithes. Then, why may we not make such a supposition in the present case? First, it is objected that it ought to be shown that the rest of the inhabitants had paid personal tithes; that is answered, by saying that the obligation of the inhabitants originally existing in custom, might have been lost by desuetude; and it is no answer to it to say, that in modern times the rest of the inhabitants do not pay personal tithes, or any composition for them. But another answer to that objection occurs to me as arising from the statutes: if you suppose a composition to be made for each individual house before time of legal memory, and to continue to be paid down to the time of *Eliz.* 6., (at which time the inhabitants at large were in the habit of paying personal tithes,) that statute would continue the immemorial composition with respect to these houses, but would put an end entirely to all obligations on the other inhabitants of the city of *London* and its suburbs to pay personal tithes; so that the effect of that statute would explain the reason why, in modern times, no personal tithes were paid for such a district. That supposition appears to me to be one perfectly consistent with law; and I am not to say whether I believe any such agreement was made; it is enough for me to say, I can assign a legal origin for that practice which has prevailed for so long a period, and which is established in other parishes by so many decrees. For these reasons it appears to me that the answer we ought to give to that question of the learned judge should be in the affirmative, and that we can assign a legal origin for the payments which are the subject of this suit. With regard to the second question, whether, in case such payments have not existed from time immemorial, but are ancient customary payments, they can still be lawfully enforced, I apprehend we need not answer it, as

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it was only put in case we should be of opinion could not on the facts infer a legal origin and an morial payment.

BOLLAND B.—I am entirely of the same opini appears to me to be the duty of the court, com the length of time during which these paymen been made, to entertain any suggestion on whi can fairly and in point of law be supported, es in a case of this sort, where at least two decre been made under precisely similar circumstances. ever improbable an arrangement might be which cover payments of this kind, still if it were pos suppose only a single case in which they might have originated, we are of course bound to loo Three have been already pointed out. It is n to mention that there may be others equally su for the purpose. On these grounds I am of that a legal origin may be presumed for this pay

ALDERSON B.—I am of the same opinion, b reserve my reasons till I am called on for my u decree in the cause.

DOE *dem.* RICHARD EUSTACE *against* EASLE

Copyhold lands situate in a manor where by custom such lands descend to the youngest nephew in default of a younger brother of the person last seised, was devised by *E.* to his widow for life, re to his nephew *A.* and his wife for their lives, remainder to their daughter life, and after the death of all the above persons, to "revert to my *next male* ever." The devisor died without issue: Held, that these words meant heirs the body, and consequently that after the deaths of the particular tenants version descended to the lessor of the plaintiff, who was the devisor's nephew, as his customary heir, and did not pass by the ultimate limitatio defendant, who was heir male general, being the son of the devisor's great nie

EJECTMENT to recover possession of cert pyhold lands and tenements holden of the

of Ealing in the county of *Middlesex*, by the agreement of the parties, and by the order of a learned baron, pursuant to 3 & 4 *Will.* 4. c. 42. s. 25. The following facts were stated for the opinion of this court.

Edward Eustace, late of *Great Ealing*, in the manor and county aforesaid, being seised of the premises in question in fee, duly surrendered the same to the use of his will; and by his will in writing, bearing date 1st *March* 1807, duly executed and attested, and since proved in the prerogative court of *Canterbury*, devised the same as follows:—"I devise and bequeath my copyhold dwelling-house, together with the outhouses, gardens and furniture, situate in *Great Ealing* aforesaid, being the premises in question, for the use and benefit of my beloved wife *Mary Eustace*, during her natural life, and, after her death, I devise and bequeath the same to the use and benefit of my nephew *John Eustace* and his wife *Sarah Eustace*, during their natural lives. I devise and bequeath the said copyhold house, together with the outhouses, gardens, and furniture, after the death of the above-named *Mary Eustace* and *John* and *Sarah Eustace*, for the use and benefit of *Sarah Eustace*, daughter of the said *John* and *Sarah Eustace*, during her natural life, and after the death of the above-named *Mary Eustace*, *John* and *Sarah Eustace*, and *Sarah Eustace* their daughter, to revert to my next male heirs for ever.

The said *Edward Eustace*, in the month of *May* 1808, died seised of the premises in question, without issue, and without having revoked or altered his said will. The said *Edward Eustace* the testator had two brothers, the elder of whom died in the testator's lifetime; the other, named *Robert*, survived the testator, and died intestate in 1813, leaving issue five sons him surviving, in order of birth as follows:—*Robert*, who died without issue; *John*, who with his wife *Sarah* and his

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daughter *Sarah*, were tenants for life, named in the testator's will; *Joseph*, who died without issue; *Edward*, now living, and *Richard*, the lessor of the plaintiff. *Mary Eustace*, the first tenant for life, survived her husband, the testator, and on the 28th *November* 1808 was duly admitted to hold the premises in question during her natural life, remainder as specified in the will. *Mary Eustace* died in *November* 1814, *John Eustace* and *Sarah* his wife, the second and third tenants for life, were duly admitted on *March* 27, 1815, to hold the same for their natural lives, remainders over as above. *John Eustace* died *July* 1823; *Sarah* died *June* 1833; whereupon *Sarah*, daughter of the said *John* and *Sarah Eustace*, the last tenant for life named in the will, and who had married a person named *Easley*, entered, and died 13th *August* 1833, leaving issue a son, *Abraham Easley*, the defendant in this suit.

The custom of the manor of *Ealing* is, that the copyhold lands and tenements descend to the youngest son; and if no son, to the youngest brother; and if no brother, to the youngest nephew of the tenant last lawfully seised of the fee, whether in possession, reversion, or remainder.

The question for the opinion of the court was, whether, under the circumstances above stated, the lessor of the plaintiff was entitled to the copyhold lands and tenements in question; and if the court should be of opinion that the lessor of the plaintiff was so entitled, then a judgment was to be entered for the plaintiff by relictâ verificatione and confession; (a) but if the court should be of a contrary opinion, then a nolle prosequi to be entered for the plaintiff immediately after the decision of the case, or otherwise as the court should think fit, it being agreed, in pursuance of the said

(a) See Tidd, 9 ed. 559.

statute, that all the proceedings herein should be pursuant to the directions and decision of the said court.

M. Dawson for the lessor of the plaintiff, was stopped by the court.

Hodgson for the defendant. The defendant is the testator's general and next *male* heir, designated by the words of ultimate devise; whereas the lessor of the plaintiff is only his customary heir. The estate is given in fact for three lives, with remainder to the devisor's next *general* heir, if a male. If the words of the will "next *male* heir" are held to amount to no more than "*next* heir," so as to let in the heir by customary descent, and will make a vested instead of a contingent estate, all the words following *revert* will, in effect, be struck out of the will; whereas, if those words are construed as a contingent remainder, the party to take must be *very* heir, as well as heir *male*. [*Parke* B. The lessor of the plaintiff is so, if the tenure of the subject-matter is considered.] If the estate devised is held to be an estate in remainder taken by purchase, then that custom being superseded by the devise, the party taking must be the defendant as common law heir, and not the customary heir (*a*). [Lord *Abinger* C. B. Suppose that when *Sarah*, the great niece of the testator, died, the next heir general had been a female?] The remainder would have failed, and the estate would have descended to the lessor of the plaintiff, for no one would have existed answering the description in the will. By the general rule grounded on *Co. Lit.* 24 b. and 164 a, no person can take by purchase as heir

(a) Brooke's Abr. tit. *Descent*, 59; *Roberts* v. *Dixwell*, 1 Atk. 607; 2 Ves. 645, S. C.; Robinson on Gavelkind, 117; Hargrave's Co. Lit. note 4 to 10 (a), and note 145 to 24 b.; *Starkey* v. *Starkey*, Exch. *Trin.* 19 *Geo.* 2. Bac. Abr. tit. *Uses and Trusts* (H), 5 Vol. 179. Edit. 1807.

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male, unless he is heir general, or complete right heir at law, as well as heir male. Lord *Cowper*, it is true, departed from that rule in *Brown* v. *Barkham* (*a*). Lord *Hardwicke*, before whom that case came by bill of review (*b*), affirmed Lord *Cowper*'s decision, but only on the ground of the devisor's intention, treating it as forming an exception to the general rule, which, while he disapproved (*c*), he at the same time appeared to recognize. Lord *Cowper*'s rule has been only applied to cases of devise to the general heirs *of the body*; the case of *Wills et ux.* v. *Palmer* (*d*) is an instance of that class. But the rule deduced from *Co. Lit.* applies here, forming, as it does, part of a much more leading principle, that the heir-at-law is not to be disinherited by implication, or by any thing short of express words; on which account the person claiming as purchaser against him ought fully to answer the description in the will: "heir male" may not do so. In *O'Keeffe* v. *Jones* (*e*), after several limitations to the devisor's sons for life, and their first and other sons in tail male, the ultimate devise was, in default of such issue, then to the devisor's next heir-at-law. Sir *William Grant* held this a common limitation to his own right heirs, when he had made as many limitations as he thought proper, and not a contingent remainder to the person who should happen to be his heir-at-law, at the time of failure of issue male of his sons. That case

(*a*) Prec. in Chancery, 442 and 461.

(*b*) Ambler, 8, nomine *Newcomen* v. *Bethlehem Hospital*; S. C. Hargrave's Co. Lit. 24 b. note 145.

(*c*) Ambler, 10.

(*d*) 5 Burr. 2617; and see *Evans* d. *Burtenshaw* v. *Wilson*, Scacc. Hargrave's note (4) to Co. Lit. 164 *a*; Appendix to Fearne's Contingent Remainders, No. X. where a daughter, though not very heir, her nephew the son of her brother being alive, took by purchase under a limitation in a deed to the *heirs female of the body* of her father.

(*e*) 13 Ves. 413; and see id. 484.

need not be disputed. In *Cholmondeley* v. *Clinton* (*a*) *Bayley* J. was of opinion, that the intent of the settlor of an estate should be considered, in order to arrive at the meaning of his settlement. Now this devisor could never have meant that the next male heirs *of his body* should succeed, for the life estates are given to his wife, to a nephew and niece, and to their daughter, who are neither the heirs of the body nor the customary heirs. Heirs male do not necessarily mean heirs of the body, and it cannot be presumed that this devisor intended to exclude from succession the son of that daughter to whom he had given a life estate, being his heir general and his heir male, by leaving the fee to descend to the customary heir, who was not an heir of his body.

Lord ABINGER C. B.—The construction hitherto put upon the words "next male heirs," has been "heirs male of the body" (*b*); and I think it would be a dangerous thing to disturb the interpretation which they have received for more than the last hundred years. There are technical words possessing a well ascertained and acknowledged meaning. It is safer to act on them than on any speculation as to the supposed intention of the devisor, which does not appear expressed in terms in any part of his will. Nothing shows us that he intended the words in question to be taken in any different sense from their legal import (*c*). If he had such intention, he has not disclosed it in apt words.

PARKE B.—The effect of the testator having left no

(*a*) 2 Jac. & W. 1; 2 B. & Ald. 625, *S. C.*

(*b*) See per Lord *Hardwicke*, Ambler, 12; Lord *Ossulston's* case, 3 Salk. 336; S. C. 11 Mod. 189, *Mich.* 7 *Ann*, cited by Lord *Macclesfield*, in *Dawes* v. *Ferrers*, 2 P. Wms. 1. See *Dawes* v. *Ferrers* in K. B. 8 Vin. Ab. 317; Chan. Prec. 589.

(*c*) See Lord *Lyndhurst's* judgment in *Doe* d. *Meyrick* v. *Meyrick*, *ante*, Vol. IV. 921, 922.

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heirs of his body is, that this property must descend according to the custom. The expression "heirs male" is now generally held to be "heirs of the body." Mr. *Hodgson's* only argument in support of a different construction from that which these words commonly receive, rests on the alleged improbability of the devisor's preferring his nephews to his own after-begotten children; but as that depends on the disposition of his mind, and only exists in conjecture, it cannot authorize us to depart from the ordinary rules of construction.

BOLLAND and ALDERSON Bs. concurred.

Judgment for lessor of plaintiff.

PRICE and Others *against* DAY, HOPE, and Others.

If a first writ is discontinued, and the costs are taxed and paid, it is not necessary that the plaintiff should give the sheriff notice of such discontinuance, or serve the rule on him before arresting the defendant on a fresh writ; and the court refused to discharge a defendant from such second arrest, on the ground that the discontinuance of the first action was incomplete on account of that omission. But they would have relieved against any actual damage sustained by the defendant.

THE defendant *Hope* was first arrested on 22d *January*, and having given the sheriffs of *London* an undertaking to procure a bail-bond, was discharged. His attorney having discovered an irregularity in the issuing the capias, gave notice of it to the plaintiffs' attorney. On the 23d a rule to discontinue on payment of costs was served on the defendants' attorney, with an appointment to tax the costs thereof on *Saturday* the 24th. The costs were taxed and paid, but the plaintiffs gave no notice of the discontinuance to the sheriffs. On the same day they issued a fresh capias, and arrested the defendant *Hope* again for the

same debt by order of a baron, under *Reg. Gen. Hil. 2 Will.* 4. No. 7. On the 26th the sheriffs were called on for a return of the actions for which the defendant *Hope* was detained, and returned, by their secondaries, that he was detained in their custody at the suit of the plaintiffs under both writs, and required bail for the whole amount for which both arrests were made. However, the notice of discontinuing the first action being brought in just after, they only required bail on the second writ, and took a bail-bond accordingly. On their parts *Channell* moved for a rule to show cause why the defendant should not be discharged out of custody, and the bail-bond, as well as the undertaking to put in bail in the first action, should not be given up to be cancelled, on the ground that there had been a double arrest, owing to the plaintiffs not having given notice to the sheriff of the discontinuance, in which case he would have given up the undertaking. Without this notice the discontinuance was incomplete, and the defendant was constructively in custody on the first as well as the second writ.

PARKE B.—The officers certify to us that an action may be properly and completely discontinued without giving the sheriff notice of the discontinuance. All we could have done would have been to relieve the defendant from any inconvenience which might have resulted from the constructive and supposed continuance of the first writ; but no such damage appears. The defendant was not prevented from putting in bail on the second arrest.

BOLLAND, ALDERSON and GURNEY Bs. concurred.

Rule refused (*a*).

(*a*) See Stra. 1209; Barnes, 399; 7 B. Moore, 312; 3 M. & S. 153.

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CREASE *against* BARRETT.

If a clerk make an entry charging himself, it is evidence against third persons after his death, even though it appears very probable that he had no personal knowledge of the facts alleged in the entry, but derived it from others.

An answer purporting to be made in 1570, by the conventionary (*a*) tenants of a manor in *Cornwall* to interrogatories by the lord's agents which had been lost, and stating his rights as lord, *e.g.* to the tenth of certain tin for toll, are admissible in proof of a custom as evidence of reputation even against the free tenants of the manor; but not if they state facts only, as "that the commons of the manor belong to the tenants of the said manor, who have always enjoyed the same under the yearly rent of 33*s.* 4*d.*"

CASE. First count, in trover for tin and tin-ore. Second count: that before and at the time of the making of the indenture thereinafter mentioned, his late majesty king *George* the Fourth, then his royal highness *George Augustus Frederick*, was duke of *Cornwall*, and as such was seised in fee, in right of his dukedom, of and in all manner of tin, in, under, and belonging to the manor of *Tewington*, in the county of *Cornwall*, the said manor being one of the ancient duchy assessional manors: that within that manor there is an ancient immemorial custom, viz. "that any tinner may bound any wastrel lands within the said manor that hath been anciently bounded and assured for a wastrel, by delivering of toll-tin to the lord of the soil before that the hedges were made upon it, and also such and so much of the princes's several and inclosed customary land within the said manor as hath been

Reputation is admissible in evidence, though unconfirmed by proof of corresponding facts.

When a judge at nisi prius offers to receive such of a certain set of documents as are evidence of reputation, having rejected others that stated particular facts on which a new trial will not be granted, if one of the latter kind is afterwards put in, and his attention be not called to its contents by objection made.

The declarations of a lord of a manor as to the boundaries of the manor, are evidence after his death, but not as to the extent of his rights over the wastes.

A lease for years, of tin-mines and toll-tin, determinable on lives, was granted in 1797, and was surrendered in 1810. Another was then granted on paying a fine, part of which was paid for the surrender of the former lease. In 1798 the lessee executed a lease of the surface: Held, that a recital in that lease was admissible in evidence against the lessee of the mines and toll in 1810; for he cannot claim by any title prior to that date.

Where evidence is rejected improperly, a new trial will be granted, unless it is quite clear that had the rejected evidence been admitted, a verdict, founded upon it, as well as on the rest of the proofs on the same side, would have been clearly and manifestly against the weight of evidence, and certainly set aside on motion as an improper verdict.

(*a*) Viz. tenants renewing their holdings every seven years. See 8 B. & Cr. 763.

anciently bounded with turfs, according to the ancient custom and usage within the said manor, or by the said tinner, marking out by bounds a certain part of such land within or under which he was desirous of working for tin; and that after such marking out, the said tinner forthwith gave due notice thereof at the proper stannary court for the said manor; and that if, after due proclamation thereof at the said court, the owner of the said tin mines within the said manor did not work for tin within or under the said land so marked out by bounds, it thereupon became and was lawful for the said tinner to work for tin within or under the said bounds, paying and rendering therefore to the owner of the said mines, a certain dish or part, to wit, one-tenth dish or part of the tin that might from time to time be worked, raised, or procured by the said tinner within or under the said bounds, the said tinner keeping the residue thereof, as and for a toll for the privilege of working, raising and procuring the same:" that on the 1st *August* 1815, his royal highness by indenture demised to *Edward Smith* all the toll and farm of tin or tin-ore which would be gained, arise, or be due in any place or places whatsoever within *Tewington*, amongst other manors; and also all the tin-mines found or to be found within the several inclosed lands of those manors, to hold for a term of years depending on lives. After deducing title under that lease, the plaintiffs alleged as a breach, that the defendant, claiming to work under and by virtue of the said custom a certain tin-mine within the said manor, worked, raised, and got therefrom large quantities of tin, tin-ore, and tin-stuff, and that although it was the duty of the defendant to pay the toll above-mentioned, yet he neglected &c., and wrongfully converted the whole of the tin, tin-ore, and tin-stuff, to his own use. In another count the toll was laid to be one-fifteenth. Plea:

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general issue. At the trial before Lord *Lyndhurst* C. B. and a special jury at *Westminster*, at the sittings after last *Trinity* term, it appeared that the plaintiff, as lessee of the *Duke of Cornwall*, sought to recover in this action the toll of tin raised from a vein or mine called *Buckler's Mine*, under a spot called *Buckler's Bounds*, situate within *Boscundle Common*, in the manor of *Tewington*, in *Cornwall*. The *Duke of Cornwall* had been lord of the manor until it was sold under the land-tax redemption act, 38 *Geo.* 3. c. 60. s. 56, with a reservation of the mines, and the plaintiff sought to show that *Boscundle Common* was parcel of the waste, and that consequently the mines under it belonged to him as lessee of the lord. *Tewington* is one of the seventeen ancient assessionable manors of the duchy of *Cornwall*, the nature of the tenures of which was settled in *Roice* v. *Brenton* (*a*). *Boscundle Common* contains about 122 statute acres, adjoining on the east a piece of anciently inclosed land, called also *Boscundle*, or *Boscundle Estate*, of about 101 statute acres, and on the other three sides adjoining the admitted waste of the manor. The defendant was one of several adventurers in the mines of the district, who took the mine in question for the Rev. Mr. *Carlyon*, Sir *J. C. Rashleigh*, and Mr. *Tremayne*, as its owners. He sought to show that *Boscundle Common* and *Estate* together composed one free tenement, and therefore that the common was parcel of the waste of that free tenement, and not of the manor of *Tewington*; and contended that the whole surface of that tenement was now the sole property of Mr. *Carlyon*, but that the persons under whom Sir *J. C. Rashleigh* and Mr. *Tremayne* claimed, having formerly been part-proprietors of it, and having reserved the mines within its commons and

(*a*) 8 B. & C. 737; 3 M. & R. 133, *S. C.*

wastes, the actual property in the mine in question was now vested in Mr. *Carlyon*, Sir *J. C. Rashleigh*, and Mr. *Tremayne*. The plaintiff also claimed one-tenth of the toll of *Tewington* instead of one-fifteenth, which was admitted to be the usual toll in the stannaries, and was the only toll that, within the recollection of the witnesses, had been received in *Tewington*. The usage as to entering lands and paying toll is contained in the presentment of a parliament of tinners, held at *Lostwithiel*, 11 *Car.* 1., and is as follows: "We present and affirm, that by common prescribed standing right any tinner may bound any wastrel lands within the county of *Cornwall* that is unbounded or void of lawful bounds, and also any several and inclosed land that hath been anciently bounded and assured for wastrel, by delivering of toll-tin to the lord of the soil before that the hedges were made upon it, and also such and so much of the princes's several and inclosed customary land within the ancient duchy assessionable manors as hath been anciently bounded with turfs, according to the ancient custom and usage within the said several duchy manors, and not otherwise, the tinner paying out of such land so bounded the usual toll only as is generally paid within the stannaries, that is, the fifteenth dish or quart; saving in such places where a special custom hath limited another rate of toll" (*a*). The plaintiff proved that the toll-tin belonging to the *Duke of Cornwall* had been in lease from the time of queen *Elizabeth* to different persons; that the Rev. Mr. *Donnithorne*, and, after his death, certain trustees for his family, had been lessees for several years immediately preceding the present lease to the plaintiff, which was granted in 1815, on the cancelling for incorrectness of a lease granted in 1810 to *Edward Smith*,

(*a*) Pearce's Laws of Stannaries, p. 37.

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in consideration of the surrender of a lease preceding it, which had been granted in 1797, and a fine of 18,500*l.* (11,942*l.* of which was paid for the surrender, and the rest to the duke.) In support of the plaintiff's case were produced several ancient documents, purporting to be answers given in 1570 by conventionary tenants of *Tewington* (*a*) to interrogatories put to them by certain commissioners sent from time to time to assess the manors and ascertain their customs. The interrogatories had been lost. The defendant objected that the ninth and tenth answers were inadmissible in evidence, but they were received by the chief baron as declarations of tenants knowing the customs of the manor, and therefore affording evidence of reputation (*b*). They were as follows,

"To the ninth article, further we say, we know no tin-works within the said manor but such as are kept under bounds, which do belong to the owners thereof; and when any tin is wrought, the tenth part thereof ought to be paid to the lord of the manor for toll thereof.

"To the tenth article we say, that the commons of the said manor do belong to the tenants of the said manor unstinted, who have always enjoyed the same under the yearly rent of 33*s.* 4*d.*, as by the records thereof, remaining with the auditor of the duchy of *Cornwall*, appeareth; unto which, for the more certainty, we refer ourselves" (*c*).

To prove that Mr. *Donnithorne*, when lessee, had received toll from this mine, by the hands of *Puckinghorne* his toller, a weighing-book was produced from a blowing (or smelting) house at *St. Austell*, in the handwriting of a deceased clerk. It was proved that tin is

(*a*) See Lord *Tenterden's* explanation, 8 B. & C. 762.

(*b*) See *Talbot* v. *Lewis*, *ante*, Vol. IV. p. 1.

(*c*) See Concannon's Report of *Rowe* v. *Brenton*, Appendix, 193.

always delivered there publicly, and generally by captains of mines or tollers, who are usually though not always known there, and are asked from whence it is brought; that when brought a part is smelted, and from the produce of which sample the fineness and weight of the whole is calculated and entered into the book. The value, as ascertained by that calculation, is then paid to the person bringing it at fixed rates. The book in which the entries are made must, by the stannary law, be kept at every blowing-house and be open for inspection. The clerk is also chargeable for the quantity of tin he enters as received. By the stannary laws (a) it is directed that "every such buyer of block tin shall enter in the blowing-house book, where he shall blow such block-tin so by him or them bought, the quantity of such tin, and the names of the person or persons of whom he bought the same; and it shall be free for any person whatsoever to inspect such blowing-house books." The following, and one or two similar entries, were objected to, but admitted in evidence.

"The executors of the Rev. Mr. *Donnithorne*, per Mr. J. *Pwdringhorne*, 1782, *July* 5.

		cwt.	qrs.	lbs.		
Pit Moor	Toll	0	3	19	at	12
Fat Work	Rough	0	3	26	at	10
Buckler's Mine	Toll	1	0	24	at	12¼
Down-a-foot	Toll	0	1	1		

On the part of the defendant was then offered in evidence a verbal declaration by the late Mr. *Rashleigh*, [illegible] to the boundary of the waste of the manor. Mr. *Rashleigh* had bought the manor from the duke with the exception of the minerals. This piece of evidence

(a) See Pearce's Law of Stannaries, 55.

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was rejected after argument. He also offered as evidence of the same boundary a lease between the prince of *Wales*, as duke of *Cornwall*, and the late Mr. *Carlyon*, dated *February* 28th, 1798, by which the duke demised to Mr. *Carlyon* for 99 years, determinable on lives, "all that piece or parcel of the common called *Tencington Common*, within the manor of *Tencington*, parcel of the ancient possessions of the duchy of *Cornwall*, in the said county of *Cornwall*, containing by estimation about 24 acres of land, separated and divided on the east side thereof from a certain common called *Bosandle Common*, the land of *T. Carlyon* esq. by stone posts marked with the letter B, and numbered with the figures 1 to 8., bounded on the west &c. with a reservation of minerals to the duke." The lease was rejected. The jury found a verdict for the plaintiff for 61*l.* viz. the amount of toll estimated at one-tenth of the ore raised.

In last *Michaelmas* term *Coleridge* Serjt. obtained a rule for a new trial on the ground of the improper admission and rejection of the above instruments in evidence. He objected to the reception in evidence of the weighing-book kept at the smelting-house, on the ground that the stannary law did not require it to be maintained from what mine the ore came; so that if known it could only be known from the declaration of the party, whether tenant or captain of a mine, who brings it, being often unknown to the clerk. Then the clerk could not be taken to have that peculiar knowledge of the facts he stated, which has always been the ground of admitting evidence of that kind. But the court refused the rule on that ground, saying, that as the clerk in the charge of the tin brought to the blowing-house, by making the entry of the fineness and weights, charged himself with the receipt of so much of it, became accountable accordingly, it was immat-

whether he himself had knowledge from what mine the tin came or derived it from others, and that his means of knowledge, though a question for the jury, did not render the evidence inadmissible.

Follett, *Bere* and *Butt* showed cause in the same (*Michaelmas*) term. First, the answers were evidence of reputation, being made by deceased persons, who, though not privies or interested, deposed to matters, of which, from the situation of their residences, they must have been conusant; *Chapman* v. *Coulan* (*a*). [*Parke* B. The question is, whether these declarations by conventionary tenants could be evidence of any thing except matters affecting their interests as such. The answers now in discussion concern the interests of the mine-owners, with which they as occupiers of the surface cannot be taken to be more acquainted than any other inhabitant of the district. *Talbot* v. *Lewis* (*b*) resembles this case.] That was not a claim of wreck by virtue of a custom said to pervade a district with an exception of some particular spot. The right to wreck, as to which the *minutes* were there tendered in evidence, was a question of grant or prescription between the crown and the lord; so that no evidence of local custom or knowledge was applicable. Whereas these answers regard the custom of a particular spot, and being made by conventionary tenants, having peculiar means of knowledge from residence on the spot, are therefore evidence of reputation. Next, *Rashleigh*'s declarations were properly rejected, for the interests in the mines and the surface are so distinct, that the declarations of the owner of the latter as to his boundaries could not affect the owner of the mines underneath. These declarations are sought to be made evidence as

(a) 12 East, 10. (b) Ante, p. [illegible]

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equivalent to those of the duke from whom *Rashleigh* had purchased, but as the duke had already demised the mines, no subsequent declaration by him could affect or diminish the interest in them. The lease of the surface to *Carlyon* in 1798 was equally inadmissible in evidence, for as the lease for years to *Dennithorn* determinable on lives was in existence, it could not be affected by the subsequent declaration of the lord. Then, though in 1810 that lease was surrendered in order to obtain a renewal on fresh lives, for which a premium was paid to the duke, still it merely continued the former lease which existed in 1798 (*a*). The surrender of the lease of 1810 in 1815, in order to the grant of a new one to the plaintiff, has the same effect, particularly as one of the lives mentioned in the original lease is admitted to be in existence. But that lease, if in point of law admissible, is a piece of evidence practically entitled to small weight, and no new trial will be granted on the single ground of its rejection, unless the court distinctly sees that if it had been left to the jury it would have substantially affected the verdict; *Doe* d. *Teynham* v. *Tyler* (*b*), *Tyrwhitt* v. *Wynne* (*c*). *Alderson* B. In *Doe* v. *Tyler* certain accounts had been improperly received in evidence. The court must there have discharged the rule for a new trial, on the ground that those accounts were immaterial to the verdict, and that the rule would have been made absolute, had the verdict been the other way. In *Rex* v. *Sutton* (*d*), *Le Blanc* J. declares the rule fundamental, that where improper evidence has been received at the trial, the court cannot sift it, in order to see whether

(*a*) See *Doe* d. *Beaden* v. *Pyke*, 5 M. & S. 146; also 9 B. & Cr. 97; 4 Geo. 2. c. 28.

(*b*) 6 Bing. 561, 4 M. & S. 377, *S. C.*

(*c*) 2 B. & Ald. 559. See *Beaumont* v. *Field*, 1 B. & Ald. 247.

(*d*) 4 M. & S. 548.

there was not enough which was admissible to sustain the verdict; because they cannot say on what part of the evidence the verdict was founded.]

Coleridge and *Talfourd* Serjts. and *Cowling* in support of the rule. There is no proof that the interrogatories, to which the answers in question purport to have been returned, at all regarded the special customs set up. But whether they did or not, these answers being obtained ex parte at the assessional courts held by the commissioners of the duke as lord of the manor, from the conventionary tenants who held from seven years to seven years, were not evidence against third persons or free tenants of the manor, who could not properly be present; *Freeman* v. *Phillips* (a). Again, that peculiar means of acquaintance with the payments for toll of tin, which forms the necessary requisite for making the answers evidence of reputation that one-tenth and not one-fifteenth was payable as toll of tin within a certain limit (b), was wanting in parties who were not shown to be tinners, and whose only apparent interest was in the occupation of the surface. [Lord *Lyndhurst* C. B. It can hardly be supposed that many of the cultivators of land thus inhabiting a mining district were not also interested in the mines.] Again, the conventionary tenants have an interest adverse to that of the freeholders of the manor, in extending the boundaries of the wastes over the surface of which they have rights of common at a fixed rent of small amount; besides that that surface is injured by the mining operations. Even presentments by copyholders are not admissible except on questions of copyhold, and never against freeholders

(a) 4 M. & S. 486, 491. In that case the copyholders making the declarations in question were the only persons conusant of the customs.

(b) Fine of tin is a small payment in the nature of a chief rent paid by free tenants (or bounders) to the lord.

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because they have no power to examine into free rights; *Roe* d. *Beebee* v. *Parker* (a), *Chapma Cowlan* (b). The ninth answer is also inadmis as evidence of reputation of a special custom to one-tenth, contrary to the general stannary law some distinct act of usage to pay that sum had proved; *Weeks* v. *Sparke* (c). The tenth answe also inadmissible as evidence of reputation, for it st a particular fact only. Next, *Barnes* v. *Mawso* shows that the declaration of *Rashleigh* as wel the lease ought to have been admitted as evid of reputation, even had those parties been intere in enlarging the commons; *Nicholls* v. *Parke* But they were in fact contrary to the interest the makers (f). Declarations as to the surface admissible, the plaintiff's right to the mine ha been put as dependant on it. The lease was a de ration against the interest of the maker, which acc panied his forbearance to do an act; for the duke not grant more land to the east, because it was alre the property of Mr. *Carlyon*; *Stanley* v. *White* The lease was also admissible on account of the i tity of interest, as the plaintiff claimed under the d taking a new interest by surrender of the old le and if it was improperly rejected, a new trial wi granted; for in the mass of conflicting evidence court cannot see that it would have produced no ference in the result; *Doe* d. *Barrett* v. *Kemp*

(a) 5 T. R. 26.

(b) 15 East, 10. And see 2 Scriven on Copyholds, 42.

(c) 1 M. & S. 679. (d) 1 M. & S. 77. (e) 14 East, 331.

(f) See as to this circumstance taken singly, Sir John Campbell's ment in *Chambers* v. *Bernasconi*, (in error) *ante*, Vol. LV. 531.

(g) 14 East, 341. Phill. on Ev. 215, 6th edit. *Edwards's* declarati noticed by Lord Ellenborough. And see *Doe* d. *Baggally* v. *Jones*, 1 C 8th.

(h) 7 Bingh. 332.

Parke B. The authority of *Doe* v. *Tyler* can only apply where it is quite clear that had the evidence which was rejected been admitted, the result must have been different. It seems to me that admissions of a preceding owner cannot be evidence against his successor unless both have the same amount of estate.]

Cur. adv. vult.

PARKE B. in this term delivered the judgment of the Court. On the motion for a new trial in this case, on the ground that Lord *Lyndhurst* received improper evidence for the plaintiff, and rejected evidence admissible for the defendant, several points were made, all of which have been disposed of, either on the motion for a rule nisi, or on the argument on showing cause, except three:—The first is, whether the answers of the conventionary tenants to certain articles (the 9th and 10th) were properly reserved in evidence for the plaintiff. The plaintiff offered, in the first instance, to read these answers to more of the articles, but it appearing that they were not signed by any freehold tenants, Lord *Lyndhurst* refused to admit them. It was then stated, that some were admissible as evidence of reputation, and Lord *Lyndhurst* said, that he should admit all that were; and the two answers to the ninth and tenth articles were offered and received on the supposition that they were so.

The objection now taken is, that the answer to the ninth article is not admissible; not because reputation on such a subject is not evidence, it being a question of the custom of mining in a particular district, but because it comes from the customary tenants, who in that character have nothing to do with the mines; and it is insisted, that it is a requisite qualification of hearsay evidence on such a subject, that it ought to be de-

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rived from those who are themselves concerned in mining or receiving the dues of the mines. That hearsay evidence on some subjects cannot be received, unless with the qualification that it comes from persons who have a special interest to inquire, is clear. Thus in cases of pedigree, it must be derived from relatives by blood, or from the husband, with respect to his wife's relationship; it is not admissible, if it proceeds from servants or friends, *Johnson* v. *Lawson* (a); and in this description of hearsay evidence, the line is clearly defined. So in cases of rights or customs which are not, properly speaking, public, but of a general nature, and concern a multitude of persons, as questions with respect to boundaries and customs of particular districts, though the rule is not so clearly laid down, it seems that hearsay evidence is not admissible, unless it is derived "from persons conversant with the neighbourhood;" see per Lord *Ellenborough*, *Weeks* v. *Sparke* (b). Therefore in *Rogers* v. *Wood* (c), a document purporting to be a decree of certain persons, the lord high treasurer, chancellor of the exchequer and under treasurer, chief baron and attorney-general, who had no authority as a court, was held to be inadmissible evidence, on the ground of reputation on the question whether the city of *Chester*, before it was made a county of itself, formed part of the county palatine, because those personages had, from their situations, no peculiar knowledge of the fact. On the other hand, actual inhabitancy in the place, the boundaries of which are in dispute, is unnecessary; and in *The Duke of Newcastle* v. *The Hundred of Broxtowe* (d), justices of the peace, at the sessions of the county within which the district was alleged to be, were held to have su

(a) 2 Bing. 86.
(b) 1 M. & S. 688.
(c) 3 B. & Adol. 245.
(d) 4 B. & Adol. 273.

cient connection with the subject in dispute, to make statements in their orders admissible.

Where the right is really public, a claim of a highway for instance, in which *all* the king's subjects are interested, it seems difficult to say that there ought to be any such limitation; and we are not aware that there is any case in which it has been laid down that such limitation exists. In a matter in which *all* are concerned, reputation from any one appears to be receivable; but, of course, it would be almost worthless, unless it came from persons who were shown to have some means of knowledge, as by living in the neighbourhood, or frequently using the road in dispute. In the case of public rights, in the strict sense, the want of proof of the persons from whom the hearsay evidence is derived, being connected with the subject in question, appears to affect the value, and not the admissibility of their evidence. In the present case, the alleged custom does not seem to be one in which all the king's subjects have an interest, but only such as may choose to become adventurers in mines. Therefore hearsay from any persons, wholly unconnected with the place in which the mines are found, would not only be of no value, but probably altogether inadmissible. But those under whose estates the minerals lie, in respect to which the custom exists, and who are more likely, than others living at a distance, to become adventurers, and consequently subject to its operation, are, in our opinion, sufficiently connected with the subject to make their declarations evidence, more especially as the very form in which they are given shows that they were consulted as persons having competent knowledge upon the matters inquired into.

An observation was made in the course of the argument, that all evidence of reputation was inadmissible, unless it was confirmed by proof of facts. We think

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that such proof is not an essential condition of its reception, but is only material as it affects its value when received. And indeed if such proof were required, there is amply sufficient in the present case. Another objection to the admission of these documents was, that the answer to the tenth article was hearsay evidence, not of a *custom*, but of a *particular fact*, and so undoubtedly it is, and it ought not to have been received; but it seems to have been admitted, in consequence of Lord *Lyndhurst*'s attention not having been drawn to its contents, and the objection was not taken after his offer to receive all; he answers that were evidence of reputation, that this particular answer was, in truth, nothing more than a statement of a particular fact. We therefore think that there should be no new trial on this ground.

The remaining objections are, that two pieces of evidence offered on behalf of the defendant were improperly rejected. First, it was argued that certain declarations of the late Mr. *Rashleigh*, as to the extent of his own claim to the waste, which claim excluded the locus in quo, ought to have been received in evidence. We think they were rightly excluded. Mr. *Rashleigh* purchased the manor of *Tewington* (with the exception of the minerals) from the prince of *Wales* as duke of *Cornwall* in *September* 1798, and died before this suit, and it was urged, that his declarations were evidence on several grounds:—first, that they were against his own interest: but that circumstance *alone* is not enough to render such declarations admissible, though it occurs in many of the cases, which have been established as exceptions to the general rule, that no hearsay evidence can be received, viz. entries of deceased receivers, incumbents, &c., and declarations of deceased occupiers, as to their own title. It is then said, secondly, that this falls within the principle of such

last-mentioned declarations. But we think that it does not. An occupier, who is proved to be in possession of a given piece of ground, is prima facie presumed to be owner in fee; and his declaration has been held to be receivable in evidence, when it shows that he was only tenant for life or years (a). This is a well-established exception to the general rule. In this case, however, there is no proof that Mr. *Rashleigh* is in possession of the locus in quo. If he had been, and had declared that he had no title to it, but was tenant at will to Mr. *Carlyon*, the case would have fallen within the established exception. This, however, is a case in which a person merely declares that he is entitled as far as a certain point, but no further; which declaration, taken altogether, can hardly be said to be against his interest; for whilst he disclaims his right to one part, he affirms it as to another. It does not appear to us that this statement falls within the principle of those made by deceased occupiers; and therefore, we are satisfied that it was properly rejected. It was then, thirdly, contended, that this was a declaration accompanying an act; but the answer is, that there was no act which it accompanied or explained. Lastly, it was urged, that it was evidence of reputation of the boundary of the manor; but, in truth, it was only a declaration as to the extent of Mr. *Rashleigh*'s own property. He was not speaking of the boundaries of the *manor*, which might, for any thing he said, have included all Mr. *Carlyon's* estate, but he spoke only of his own waste.

The last objection is, that the declaration of the prince, contained in a lease of *February* 1798, was improperly rejected. In the description of the parcels in that lease from the prince to *Thomas Carlyon*, they,

(a) See *Doe* d. *Human* v. *Pettit*, 3 B. & Ald. 223.

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are described as separated on the east side from common called *Boscundle Common*, the land of M *Carlyon*, by certain stone posts; and it was therefo contended that this amounted to an admission th *Boscundle Common*, the land, in which the mines i question were worked, was Mr. *Carlyon's*. This lea was rejected, on the ground that there was a lease the mines and toll of tin then outstanding, dated 1797, which was surrendered to the prince in 181 and a new one then granted, under which the plai tiff claimed; and Lord *Lyndhurst* thought the a mission of the prince was not receivable in evidence affect the first lessee, or the plaintiff who afterwar had the interest in the lease.

We, however, are of opinion, that the plaintiff ca not be considered as claiming by any title prior 1810. The first lease is entirely at an end by su render, and the second begins in that year; cons quently any admission of the prince made before th time, which is relative to the matter in issue and co cerns the estate in the mines, is evidence against th lessee, who claims under the prince by title subs quent.

This admission certainly falls under that descriptio inasmuch as it is an admission that the surface of th locus in quo, under which the plaintiff now claims th minerals, on the ground that it was part of the wast of the manor in 1798, was at that time private propert

It may be that the supposed admission may readi be explained, and may not weigh in the least again the very strong evidence of the right of the prince the mines in question, from the actual perception toll from them for a considerable period; but we ca not, on this account, refuse to submit the question the consideration of another jury.

The authority of *Doe* d. *Lord Teynham* v. *Tyler* (a) was quoted, to show that the court have a power to refuse a new trial, where evidence has been improperly rejected, if, in their judgment, the evidence ought to have no effect, and there is enough to warrant the verdict against the party on whose behalf that evidence was offered, supposing it to have been admitted. Something to the same effect had fallen from Sir *James Mansfield* in *Horford* v. *Wilson* (b), and from Lord *Tenterden* in *Tyrwhitt* v. *Wynn* (c).

But we cannot help thinking that the rule is there laid down much too generally; and it is obvious that if it were acted upon to that extent, the court would, in a degree, assume the province of the jury; and, besides, its frequent application would cause the rules of evidence to be less carefully considered, and the litigant parties would in all probability have on most occasions recourse to bills of exceptions for the rejection or reception of improper evidence—a course productive of great delay and inconvenience. In some cases, no doubt, the court may refuse a new trial, when a witness has been improperly rejected; as where the fact which such evidence was to establish was proved by another witness, and not disputed; *Edwards* v. *Evans* (d); or where, assuming the rejected evidence to have been received, a verdict in favour of the party for whom it was offered, would have been clearly and manifestly against the weight of evidence, and *certainly* set aside, upon application to the court, as an improper verdict.

We cannot say, however strong our opinion may be on the propriety of the present verdict, that if the lease had been received, it would have had no effect with

(a) 6 Bing. 561. (b) 1 Taunt. 14.
(c) 2 B. & Ald. 559. See also *Edwards* v. *Evans*, 3 East, 451; *Nathan* v. *Buckley*, 2 B. M. 153. (d) 3 East, 451.

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the jury, nor that it is clear beyond all doul verdict had been for the defendant, that it wo been set aside as improper; and therefore we tl there must be a new trial.

Rule absolute for a ne

CHARLESWORTH *against* RUDGARD.

The *Lincoln* local improvement act, 9 *Geo.*4.c.xxvii. prohibited certain commissioners from acting in execution of the act when personally interested, and imposed a penalty on them for so doing. By a subsequent clause it enacted, that if an action was brought against any person *for any act or thing done in execution of, or under the authority of the act*, and the plaintiff should be nonsuited, the defendant should recover treble costs. The plaintiff sued the defendant for a penalty upon the act, for acting in execution of the act sonally interested, and was nonsuited.—Held, that the defendant's actin missioner was not *an act or thing done in execution of or under the aut act*, so as to entitle him to treble costs.

THE plaintiff in this case was nonsuited o cond trial (*a*), and the master taxed treble the defendant, under section 160 of 9 *Geo.* 4. (local).

Hill moved for a rule to show cause why tl should not review his taxation. An action f ties is not within section 160. [*Parke* B. *Wallis* (*b*) is in point.] The court having gr rule,

Adams Serjt. showed cause in the first instai defendant, "acting as a commissioner," was " thing done in *execution* of or under the aut the act." In *Smith* v. *Wallis* the defendant sued for a penalty incurred by shooting withoı certificate, and obtained a verdict; he clearly be entitled to treble costs, as acting in pursuar game act. [*Parke* B. The principle of that that it only gave treble costs to persons sued

(*a*) See *ante*, Vol. IV. 824. (*b*) 1 T.

purporting to be done "in pursuance" of the act, and succeeding in their defences. I never knew a clause of this nature applied to actions for penalties imposed by acts.] A commissioner acting under the act is entitled to treble costs, when sued on the same principle as justices, &c.

Hill in support of the rule. Sections 159 and 160 substantially resemble each other. The defendant, to recover treble costs, required the protection of the statute, by having done some act rendering him liable to an action. He cited *Willett* v. *Tiddy* (*a*), and *Umpkelby* v. *M'Lean and another* (*b*).

Cur. adv. vult.

The judgment of the court was afterwards delivered by

PARKE B.—In this case a motion was made on *Thursday* last for the master to review his taxation, by disallowing to the defendant treble costs, which had been taxed under 9 *Geo.* 4. c. xxvii. s. 160. a local act; and cause was shown in the first instance. We are of opinion that the rule ought to be made absolute.

The action was brought for a penalty, under the thirteenth section, for acting as a commissioner, being disqualified under the act; that is, for acting in a case wherein he was personally interested in the matter in question. The plaintiff was nonsuited on the last trial; and the question is, whether the defendant was entitled to his treble costs, under section 160. We think that he was not, and that this section applies not to actions for penalties for disobeying the statute, but only to cases in which defendant has done an act for which he would be liable to an action, unless he had the protection of the statute; and has acted, in so

(*a*) 12 Mod. 6, case 16. (*b*) 1 B. & Ald. 42; 4 B. & Cr. 212.

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doing, either in obedience to it, or under the belie founded on reasonable grounds, that he was so acting to cases, for example, in which a commissioner migl have had an action of trespass brought against hi for removing an obstruction in the streets, under tl 75th section, or a person employed to impound catt for taking a man's horse in the street, and detainin him till he paid the penalty, under the 90th section.

This court has already determined, when the cas was before them on a former occasion (*a*), that sectio 159 did not apply to this action for a penalty. Th section provides that no plaintiff or plaintiffs shall re cover in any action commenced against any person o persons for any thing done or performed in executio of or under the authority of this act, unless notic thereof in writing shall be previously given to th person or persons intended to be sued, twenty day before such action shall be commenced; which notic shall be signed by the said plaintiff or plaintiffs, or hi her, or their attorney or attornies, and shall clearl and distinctly specify the cause of such action; no shall such plaintiff or plaintiffs recover in any sum action if tender of sufficient amends shall have be made to him, her, or them, or to his, her, or th attorney, by or on behalf of the said defendant or fendants, before such action shall be commenced; a in case no such tender shall be made, it shall be law for the said defendant or defendants in any such acti by leave of the court, at any time before issue joined, pay into court such sum or sums of money as he, or they shall think proper; whereupon such proce ings, order, and judgment shall be made and give and by such court as in other actions where the fendant is allowed to pay money into court. T ground of our decision was, that the context show

(*a*) *Ante*, Vol. IV., 824.

that the object of the notice was to enable the party to tender amends, and where a penalty was supposed to be incurred, no amends could be tendered. We think we should put the same construction on words in the 160th section, which are almost identically the same; and for a similar reason, namely, that the whole provisions of that clause show, that it was intended to confer a benefit on the defendant, which the legislature could never have meant to give to persons acting in violation of the duties imposed on them by the act; and when we refer to the particular provisions of the section which the legislature supposes to apply to all such actions as are within the section, we shall find many of them to be inapplicable to actions for penalties. Section 160 enacts, "that no action or suit shall be commenced against any person or persons for any act or thing done in execution of or under the authority of this act, after three calendar months from the time when the cause of such action shall have arisen or been committed, or have ceased and been determined; and in every such action or suit the venue shall be laid and the cause tried in the city, county, or place where the cause of such action shall have arisen or been committed, and not elsewhere; and the defendant or defendants in every such action or suit shall and may, at his or their election, plead specially or the general issue, and give this act and the special matter in evidence at any such trial, and that such cause of action arose or was committed in pursuance or under the authority of this act; and if the same shall so appear upon the said trial, or if such action or suit shall have been commenced before such notice shall have been given as aforesaid, or before the expiration of twenty-eight days from the service thereof, or after sufficient amends and satisfaction made or tendered as aforesaid, or after the time limited for commencing the same, or shall be commenced

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in any other city, county, or place than as aforesai then and in any of the said cases the jury shall find verdict for the defendant or defendants; and upon suc verdict, or if the plaintiff or plaintiffs upon the sai trial shall be nonsuited or shall discontinue his, her, t their action or suit after the said defendant or defen ants shall have entered an appearance thereto, or upon any demurrer judgment should be given again the said plaintiff or plaintiffs, then and in every suc case the said defendant or defendants shall recove treble costs, and have such remedies for recovering th same as any other defendant or defendants hath or hav in other cases by law." All these enactments ar clearly meant to be advantageous to the defendant, an the provision that the defendant may plead the gener issue, and give the act and special matter in evidenc and that the cause of such action arose or was com mitted in pursuance of the act, is clearly inapplicabl to an action for a penalty. So is the enactment, that i it shall appear upon the trial that no notice was give for notice is not necessary in such an action; and e also, that a sufficient tender of amends was proved.

For these reasons we are of opinion that the clau in question does not apply to the present case.

I should observe, that a similar question appear have arisen in a case reported in *Viner's Abridgme* tit. *Costs* (I), pl. 18. in an action for a penalty against commissioner of the land tax; where the point w not decided, as the Court set aside the execution f double costs, on the ground that in the first instan the defendant received single costs. That case cann be considered as an authority either way. On the oth hand, in the case of *Wright* v. *Horton* (a), which w an action on the 18 *Geo. 2.* c. 20., to recover a penal against the defendant for acting as a justice of the peac

(a) Holt, N. P. C. 458.

not being duly qualified, *Wood* B. ruled that the defendant was not within the *24 Geo. 2.* c. 44., which requires notice of action to be given to a justice in actions for any thing done by him in the execution of his office; but his decision proceeds on a different ground from that upon which we decide the present case.

Rule absolute.

ATKINSON *against* WARNE.

A declaration in trespass for assault and false imprisonment, contained only one count. Justification, that the plaintiff was apprehended on a charge of felony, and that because he resisted and beat the defendant, the defendant a little beat and assaulted him. Replication, de injuriâ. The defendant proved that the plaintiff was apprehended on a charge of felony, but did not go on to prove that he resisted, and that the defendant assaulted him in consequence. Verdict for the defendant; and the court refused to set it aside, for only one assault could be given in evidence on one count; and that assault having been covered by that part of the plea which stated the occasion of apprehending the plaintiff, the defendant was not obliged to prove any other part of his plea.

TRESPASS and false imprisonment. The declaration consisted of only one count, stating that the defendant on &c., with force and arms, made an assault upon and beat the plaintiff, and caused him to be apprehended on a false and malicious charge of felony, and forced him to go from a certain dwelling-house, situate &c. into a public street, and in and along divers public streets, to a certain station-house, and there imprisoned the plaintiff upon the said charge for the space of three days then next following, and afterwards compelled him to go into a public street, and in and along divers public streets, to a public office, situate &c., and then and there imprisoned the plaintiff upon the said charge, without any reasonable or probable cause, for a long time, to wit, forty-eight hours then next following, and against the will of the plaintiff, by means whereof, &c. Plea, that before the committing the said supposed trespasses, &c. to wit, on &c., the said plaintiff did there feloniously take, steal, and carry away divers, to wit, twenty pounds of fea-

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thers, part of a certain bed let to be used by him and with divers rooms and premises, part of the dw ing-house in the said declaration mentioned, unde certain contract entered into by him, whereby the plaintiff was guilty of felony, contrary to the form the statute in such case made and provided, against the peace of our lord the king; wherefore defendant did, at the time when &c. in the said de ration mentioned, assault and beat the said plain and gave the said plaintiff in charge to one *T.* then being one of the metropolitan peace officers cording to the statute, and a peace officer of our s lord the king, authorized in that behalf, and then there requested the said *T. B.*, so being such pe officer as aforesaid, to take the said plaintiff into custody and safely keep him, and carry and con him, the said plaintiff, into the said street, and in along the said public street to a certain station-ho as in the said declaration mentioned, and to impri the said plaintiff on the said charge, and to carry convey him afterwards before some one of the just assigned to keep the peace of our said lord the within the said county, and to hear and determ divers felonies and misdemeanors committed wi the said county, to be examined by and before s justices touching and concerning the premises, an be further dealt with according to law; and on t occasion the said *T. B.*, so being such peace office aforesaid, at the request of the said defendant, assault the said plaintiff, and did take the said plai into his custody; and because the said plaintiff resist and beat the said *T. B.*, and would not, b then and there requested, peaceably and quietly ceed with the said *T. B.* to the said station-house the said *T. B.* did then and there necessarily a strike and beat the said plaintiff, and did oblige

aid plaintiff to go, and did carry and convey the said laintiff from the said dwelling-house into the said ublic street, and in and along divers other public treets, to the said station-house in the said declaration ientioned, and did then and there imprison the said laintiff on the said charge for the said space of time i the said declaration mentioned, being then and there reasonable time in that behalf; and, as soon as he onveniently could, he compelled the said plaintiff to o into a street, and in and along divers public streets, a public office, situate &c., and then and there imrisoned the said plaintiff; and the said plaintiff was ccordingly carried and conveyed in custody to the aid public-office, before *J. R.*, esq. one of the justices assigned to keep the peace of our said lord the ing within and for the county aforesaid, and also to ear and determine divers felonies, trespasses, and ther misdemeanors in the said county, to be examined by and before the said *J. R.*, esq. so being such ustice as aforesaid, touching and concerning the said remises, and to be further dealt with according to aw. And so by means of the premises the said defendant made an assault upon and beat the said plaintiff, and caused him to be apprehended on the said harge of felony, and forced him to go from the said welling-house into a public street, and in and along ivers public streets, to the said station-house, and imrisoned the said plaintiff upon the said charge, and ompelled him to go into the said public street in that ehalf mentioned, and in and along divers public treets, to the said public-office, and imprisoned the aid plaintiff upon the said charge for the said space f time in the said declaration mentioned, the same eing a reasonable time for that purpose; and which re the said supposed trespasses in the said declaration entioned, and whereof the said plaintiff hath above

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complained against the said defendant. Verifi Replication, *de injuriâ*. Verdict for the defend having proved a justification of one assault; b evidence was given to prove that part of the which stated, that the plaintiff "resisted the officer, and refused quietly to proceed to the house in his custody, wherefore the defendant beat and assaulted him."

F. V. Lee moved to enter a verdict for the pl The defendant was bound to have proved the of the matter stated in the plea, as a defence t action.

Lord ABINGER C. B.—Only one assault was ch in the declaration, and to which one plea was pl justifying that assault. If the plaintiff prove assault to have been committed, and the defe proved so much of his plea as sufficiently ans that assault, it was unnecessary for him to prov rest of his plea. As the plaintiff could not proved more than one assault, the defendant not be liable to prove more than a sufficient ansv that single assault.

BOLLAND and GURNEY Bs. concurred.

Rule refused.

(*a*) See *Timothy* v. *Simpson*, *ante*, 244; *Stante* v. *Pricket*, 1 473; 1 Saund. 299, n. (*b*).

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BEGBIE *against* GRENVILLE.

Where, on issues of nul tiel record, the plaintiff draws up the record for the defendant, a four-day rule to produce the record must be served on the defendant.

TRESPASS. Plea of judgment recovered, and issue of nul tiel record. *Mansel* had obtained a rule for leave to sign judgment as for want of a plea, on *Reg. Gen. Hil.* 4 *Will.* 4. No. 8. [*Ante*, Vol. IV. *sub fin.* p. ii.] on the ground that though as the judgment being of nonsuit in this court, its date need not be stated in the margin of the plea, yet that the number of the roll on which the proceedings were entered was improperly omitted there. At the time of showing cause the plaintiff's counsel had in court a roll drawn up by the plaintiff for the defendant.

Platt for defendant. The plaintiff has not served the defendant with a four-day rule to produce the record. The record in court is not produced by the defendant, but being made up by the plaintiff for him, it may differ from the plea.

Lord ABINGER C. B.—The officer certifies to us, that when on issues of nul tiel record the record is not drawn up by the defendant, but by his adversary, the latter should give the defendant a four-day rule to produce the record.

Rule discharged.

ARNULL *against* WEATHERBY.

A capias ad satisfaciendum in the body of it stated the sum recovered to be 100*l.*, but was indorsed for 88*l.* only, that being the real amount of the damages and costs; and the defendant was actually taken in execution for the smaller sum. After rule obtained to set aside the ca. sa. and discharge the defendant out of custody a rule was obtained to amend the ca. sa. The court set aside the first rule with costs, and made the second absolute on payment of costs.

ON the 22d *January Mansel* had obtained a rule to show cause why the testatum ca. sa. issued against

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ARNULL v. WEATHERBY.

the defendant should not be set aside, and the defe ant, who had been taken in execution on the 12th, charged out of custody, on the ground that the stated in the ca. sa. to be recovered by the plaintiff 100*l.*, whereas the judgment was for only 88*l.* dama and costs. *Fish* afterwards obtained a rule to sh cause why the testatum ca. sa. should not be amend it being indorsed 88*l.*, for which sum only the defe ant had been taken in execution, and that 100*l.* h been put in the body of the ca. sa. by mistake. Be rules coming on together,

Fish in support of the ca. sa. showed cause agai the first rule. First, the affidavit does not show application to be made by the defendant, but by *R. F.* of *H.* gentleman, not stating him to be attorney for defendant. Secondly, the application is too late. T defendant has not been prejudiced. In support of second rule, he said that *Laroche* v. *Wasbrough* (*Newnham* v. *Law* (*b*), and *Shaw* v. *Maxwell* (*c*), show that a plaintiff may amend a ca. sa. after execution, payment of costs.

Mansel having been heard,

Per Curiam.—The blot in the writ is now cure The rule for setting aside the ca. sa. must be discharg without costs: and the rule for amending the ca. s must be absolute on payment of costs.

(*a*) 2 T. R. 737. (*b*) 5 T. R. 577. (*c*) 6 T. R. 450.

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WHITE *against* MAYOR.

ALEXANDER moved to review a taxation, by which the master had not allowed the costs of detention of a foreign witness in this country. *Macalpine* v. *Powles* (*a*) shows that such expenses may be allowed at the master's discretion, subject to the review of the court, as well since 1 *W.* 4. c. *22.* as before.

In order to review a taxation by the master for disallowing the expenses of detention of a foreign witness in this country, it should be shown that the master did not exercise his discretion on the subject after special grounds for the allowance had been laid before him.

Lord ABINGER C. B.—The master certifies to us that he exercised a discretion, and your affidavit does not state that he did not. Any special ground for allowing these expenses should have been shown vivâ voce before the master.

Rule refused.

(*a*) *Ante*, Vol. III. 871.

LORD *against* HOPE.

ADAMS Serjt. had obtained a rule to open a rule for staying proceedings herein, in order to amend a mistake in its terms. It afterwards appeared, that on the 2d *May* last the rule which he proposed to open had been made absolute for staying all proceedings, after cause shown, and that he had now used affidavits which were before used on that occasion. [Lord *Abinger* C. B. On moving to open a rule of court the affidavits on which it was made absolute cannot be used in support of it, unless the rule is drawn up on reading

Mistakes in the terms of rules may be amended on motion to open them made within the same term, or perhaps that following; but where more time has elapsed, the affidavits which were used on the occasion of making the first rule absolute, cannot be referred to in order to open it, unless the new motion is made and the new rule drawn up on reading them.

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them, but matter subsequent to the first rule must be shown. It is a familiar practice of the courts to amend mistakes which occur in drawing up their rules, on application within the same term in which they were made absolute, or perhaps the term following (*a*), but not after. It would be very dangerous to permit a rule made some terms ago to be opened on the mere suggestion of counsel and recollections of the judges.

The other barons concurred.

Rule refused.

(*a*) See *Rex* v. *Sheriff of Middlesex*, in *Cooper* v. *Jagger*, 1 Chit. R. 4[illegible] and Tidd, 9th ed. 506.

TARQUAND *against* DAWSON.

If a witness who is necessary to the plaintiff's case is not sent for in time, owing to the fraudulent management of the defendant's attorney in negotiating till too late for the plaintiff to procure his presence at the assizes, the plaintiff should apply to the judge at nisi prius to put off the trial; and, if refused, should withdraw the record; but he must not take his chance of success by trying the cause, for, if nonsuited, the court will not grant a new trial.

ASSUMPSIT for clothes sold and delivered to [illegible] defendant's son. Plea, non assumpsit. [illegible] cause was tried before *Taunton* J. at *Derby*, on *Thursday* the last day of the last assizes. A negotiation for settling the cause went on till the *Wednesday*, when it was broken off, and the plaintiff then sent to *Manchester* for a necessary witness, *Bosworth*. He did not arrive at *Derby* in time, and the plaintiff was nonsuited. In last *Michaelmas* term *Whitehurst* moved to set aside the nonsuit and have a new trial, on the ground that by the fraud of the defendant's attorney the plaintiff was prevented from obtaining the timely attendance of the witness. A rule having been granted,

Hill and *Bourne* showed cause. A party cannot be

suffered to say, "If I had brought such a witness I should have had a verdict." The plaintiff should have secured the attendance of the necessary witnesses without speculating on the probability that the cause would be settled. At all events, after sending for the witness he should have withdrawn the record, or applied at nisi prius to put off the trial.

Whitehurst in support of the rule. Had it not been for the management of the defendant's attorney in holding out his readiness to settle the cause, the witness would have been at *Derby*. There was not time to fetch him before the assizes ended. There was also a question, whether the clothes were necessaries or not? [Lord *Abinger* C. B. That could only arise in an action against the son.] It might arise if the father turned his son out of doors. [*Parke* B. The present case is not that of a wife whose whole property, present and future, vested by marriage in the husband, but of a son who was not incapacitated to retain any property he might earn or become possessed of as against his father.]

Lord ABINGER C. B.—The rule that the trial of a cause at the assizes will not be postponed at the plaintiff's request is not inflexible. The application should have been made to the learned judge to put off this trial; and if refused, it would have been proper to withdraw the record; but the plaintiff cannot be suffered to secure a double chance of success by first trying the cause, and then, if unsuccessful, obtaining a new trial.

The other barons concurring,

Rule discharged (*a*).

(a) See *Marsh* v. *Monckton*, *Mich.* 1835, 1 Tyr. & Gr. 34; *Cooke* v. *Berry*, 1 Wils. 98; also 1 Pri. 143; 9 Pri. 89.

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LEVI *against* DUNCOMBE.

A judge's order had been made a rule of court, and personally served on the party called on to act according to its exigency. A rule was afterwards obtained to show cause why an attachment should not issue against the party, for disobeying that order, but was not personally served on him. Held, that appearance by counsel, who showed cause against the rule, relying on want of such personal service, waived the irregularity; and the rule was made absolute for issuing an attachment.

A Rule had been obtained by *Thesiger*, calling (the plaintiff to show cause why an attachme should not issue against him for not delivering his b of costs pursuant to a judge's order, which had been ma a rule of court, and, as was stated, personally served (the plaintiff (*a*). Cause was shown by *Humfrey* a *Hughes*, that the rule had been served on the plaintif clerk, and not on the plaintiff personally. [Lord *Abing* C. B. The question is, whether cause is now show for if the plaintiff appears by his counsel against tl rule, then, as it was granted merely to bring him b fore the court to explain his disobedience of its rule, is immaterial whether it was personally served or n That which constituted the contempt was not the d regard of the rule to show cause,—for that did r call on the plaintiff to do any thing unless he pleased, but his previous disobedience of the judge's ord which had been made a rule of court. The person service of that order on the plaintiff was therefo necessary in order to bring him into contempt.] Sin *Reg. Gen.* 2 *Will.* 4. s. 71., it is not essential to tl regular service of ordinary rules, that the original ru should be shown, unless demanded, "and except cases of attachment." Then *Weston* v. *Faulkner* (applies, where this court said, that service of all pr cesses, having throughout for their object to bring party into contempt, should be personal, except t court specially order to the contrary.

(*a*) See *Stunnell* v. *Tower*, *ante*, Vol. IV., 862; *Rex* v. *Smythies*, 3 T 351; *Barnard* v. *Berger*, 1 New R. 121; 7 D. & R. 612, 5 id. 614.

(*b*) 2 Pri. 2.

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Lord ABINGER C. B.—The object of the present rule is not to bring the plaintiff into contempt, but to punish him for a contempt already incurred by disobedience of the order which had been made a rule of court. Even if we had thought it right to be certain that the rule reached the plaintiff by inquiring if he had been personally served with it, his appearance has waived all necessity for showing such service. It is a well known rule in civil proceedings, and even in cases of summary convictions, that appearance by a party who has not been regularly served is a waiver of the irregularity, and has the same effect as if the service had been regular (*a*).

The rule was made absolute with costs, subject to an order not to draw it up for a month, so as to afford an opportunity to avoid the expense of issuing the attachment.

(*a*) Tidd, 9 ed. 160.

FULLER's Bail.

If the defendant be a prisoner, the notice of bail must state that fact.

ARCHBOLD in support of bail. The officer of the court objects to the notice of bail as insufficient, for not stating the defendant to be a prisoner; but no rule or statute exists by which, if the defendant be a prisoner, the notice of bail needs state him to be such. The plaintiff does not require that information, nor does he oppose the bail.

ALDERSON B. (sitting alone.) This notice of bail is defective, according to a case of *Hayton*'s bail; and it is better to adhere to a rule of practice when established, than nicely to consider the reasons for it.

The bail did not justify.

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MOODY *against* ASLATT and Others.

In an action for negligence, by which a coach was injured, a plaintiff declared and proceeded to issue in the name of "*William*" *Moody*, the court refused to amend the proceedings by substituting the name of *John*, which was the name of the father of *William*, though *John* was sworn to be the party originally intended to be the plaintiff; for if that was the fact it was too late in the cause for the defendant to take advantage of the misnomer, and if it were not, no amendment should be granted for the purpose of letting in his evidence.

AN action on the case against commissioner turnpike-road for negligently leaving a hole per quod the plaintiff's coach sustained damage arrived at issue; but instead of stating the plai name according to the fact "*John*" *Moody*, i throughout alleged to be "*William*" *Moody*. *frey* moved to amend the writ, declaration, and all quent proceedings, by inserting the christian name instead of *William*, on affidavit that though a *W Moody*, the plaintiff's son, drove the coach at the *John Moody*, the father, was the party really int to be plaintiff.

PARKE B.—If *John* and not *William* was, in th instance, really intended to be the plaintiff, h safely try the cause without the amendment praye the defendant cannot now take advantage of a misnomer at this stage of the cause (*a*): but if t was originally meant to be the plaintiff, no amen will be allowed, so as to let in his evidence.

The other Barons concurring,

Rule refu

(*a*) See 3 & 4 W. 4. c. 43. s. 11.

CLEMENTS *against* NEWCOME.

Where in an action for libel a rule was granted to change the venue from *London* to *Lincolnshire* on the usual affidavit, a rule it back to *London*, on affidavit that the libel was published there as well as *colnshire*, was made absolute, without calling on the plaintiff to undertake material evidence in *London*.

CASE for libel. A rule nisi had been gran change the venue from *London* to *Lincolnsh*

the usual affidavit, viz. that the cause of action arose in *Lincolnshire*. A rule to bring back the venue having been afterwards obtained on an affidavit that the libel had been published in *London* as well as *Lincolnshire*, but without undertaking to give material evidence in the former county, cause was shown on that ground. But,

Per Curiam—The first rule for changing the venue appears to have been irregularly obtained, for it is sworn that the newspaper containing the libel was published in *London*. That is sufficient to entitle the plaintiff to retain the venue.

Rule to change the venue discharged. Rule to bring it back absolute.

W. H. Watson supported the rule to bring back the venue. *R. V. Richards*, the other rule.

STEWART and Another, Assignees of GRIMSDALE, a bankrupt, *against* MOODY and Another.

TROVER for chattels of the bankrupt. Pleas: first, not guilty; secondly, that *Grimsdale* was not a bankrupt; thirdly, that before his bankruptcy he assigned the said chattels to the defendants. The replication to the third plea set out an indenture of assignment by *Grimsdale* of *all his property* to the defendants, in trust to pay off a mortgage, and afterwards to pay and discharge all his just debts, and then

A trader assigned all his property in trust to pay off a mortgage, and afterwards to discharge all his just debts. Held, upon the words of 6 *G.* 4. c. 16. s. 3., that this assignment must be taken to have been made with intent to defeat or delay his creditors; for delay being the necessary consequence of the act of assignment, it must be taken to have been intended, and no evidence is necessary of the intention with which it was executed.

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STEWART and Another v. MOODY and Another.

alleged that the said *Grimsdale* was a trader, that was in embarrassed circumstances at the time executed the assignment; that it was fraudule executed by him; that no notice was published in Gazette two months after its execution; that he th by became bankrupt, and being indebted to *H. Re* in 100*l.*, a fiat in bankruptcy issued against him, un which the plaintiffs were appointed assignees. T rejoinder traversed that any debt was due to *Reeves*, and also that the bankrupt executed the d fraudulently and with intent to defeat or delay creditors. Notice was given of disputing the act bankruptcy, and the petitioning creditor's debt. the trial at the *Middlesex* sittings after *Michael* term, the jury found that a debt was due to *H. Reev* but the assignment in the replication being proved have been executed on 2nd *November* 1832, *Gurn* B. directed them that the deed was an act of ban ruptcy. Verdict for plaintiff.

Biggs Andrews moved for a new trial. The ju were misdirected; for though under the repealed st tute 1 *Jac.* 1. c. 15., this deed of assignment would ha been held an act of bankruptcy if the creditors we in fact delayed, without any necessity to prove that be the bankrupt's intent in executing the assignmen it is otherwise under the present bankrupt act, 6 *Geo.* c. 16., which has made it material for those who di pute an assignment of this kind by a bankrupt, prove that the intent with which it was made was defeat or delay the creditors. Under the second secti of 1 *Jac.* 1. c. 15., a transfer of his goods by a trader " the intent, or whereby his creditors shall or may be d feated or delayed for (*a*) the recovery of their just a true debts," might properly be held to be an act of ban

(*a*) *Sic*.

ruptcy, without any necessity to prove the intent of the transfer: but section 3 of 6 *Geo.* 4. c. 16., omits the general words, "or whereby," and only uses the words, "with intent to defeat or delay the creditors." Though a transfer of property to this extent was often held an act of bankruptcy under the repealed statute of *James*, Lord *Eldon*, in *Ex parte Bourne* (*a*), doubted the principle of those decisions. Again, in *Dutton* v. *Morison* (*b*), he treated *Worseley* v. *Mattos* (*c*) as leaving the subject of intention open to parol evidence.

PARKE B. (*d*)—The assignment by *Grimsdale* of all his property was clearly an act of bankruptcy. *Robertson* v. *Liddell* (*e*) clearly established that an assignment of a trader's whole effects to trustees for the benefit of his creditors, was an act of bankruptcy; and settled that the words, "or whereby," in the statute of *James*, did not alter the preceding words, "to the intent;" and that the words taken together, "to the intent *or whereby* his creditors *shall or may* be defeated or delayed," were to be construed "to the intent that his creditors shall, or whereby they *may* be defeated." Though the terms of the third section of 6 *Geo.* 4. c. 16. are shorter, they apply to every act of bankruptcy before mentioned, and have the same object and effect as the former act, without any intention to alter the former law on the subject. If the necessary consequence of a man's acts be to delay his creditors, that must be taken to be his "intent." A trader's parting with all his effects so as to place them in different hands from those into which they would other-

(*a*) 16 Ves. 148. (*b*) 17 Vesey, 193. (*c*) 1 Burr. 467.
(*d*) Lord *Abinger* C. B. was sitting in Equity, and *Alderson* B. had gone to Chambers. (*e*) 9 East, 487.

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wise fall by operation of the bankrupt laws, must, by necessary consequence, be an act of bankruptcy.

BOLLAND and GURNEY Bs. concurring,

Rule refused (a).

(a) See *Carr* v. *Burdiss*, *ante*, p. 136; *Botcherley* v. *Lancaster*, 1 Ad. & Ell. 77; *Baxter* v. *Pritchard*, id. 456; *Rose* v. *Haycock*, id. 460.

IN THE EXCHEQUER CHAMBER.

FISHER *against* COCHRAN, Administratrix.

(In Error from the Exchequer of Pleas.)

[Before Lord DENMAN C. J. LITTLEDALE, PATTESON, and WILLIAMS, Justices of K. B.; J. A. PARK, GASELEE, VAUGHAN, and BOSANQUET, Justices of C.P.]

A policy of insurance on a ship, contained a memorandum in the margin, that the said ship was "warranted not to sail for *British North America* after 15th *August* 1831."

ASSUMPSIT on a policy of insurance on a ship, *Cyclops*, which, by memorandum in the margin, was warranted not to sail *for British North America* after 15th *August* 1831. (The facts of this case are stated at length *ante*, Vol. IV. 424.) The court having ordered a new trial, it took place at the *Lancaster* summer assizes in 1834, when the jury found that the

On that day she was in dock at *Dublin* ready for sea, and having cleared for *Quebec* was hauled out of dock into the *Liffey*, as early in the afternoon as the tide permitted. The wind blowing strong and directly up the river, she could not set a sail, but was warped down about half a mile, when the tide falling she took the ground. She was warped a little further next day, took the ground again when the tide fell, being still ten miles from the harbour's mouth. On the 17th, the wind having changed, she set her sails and got to sea, but was lost on the voyage. The jury found that the master and crew, by hauling out of dock and warping down the river on the 15th, intended to put themselves in a more favourable situation for prosecuting the voyage from *Dublin* to *British North America*, and not merely to fulfil the warranty, but that, at the same time, when the vessel quitted the dock they knew it was impossible to get to sea that day. Held, that the ship was, on the 15th *August*, in prosecution of the voyage assured; and, therefore, that the warranty was satisfied, and the policy available.

master and crew of the *Cyclops*, by hauling out of dock and warping down the river *Liffey* on the 15th *August*, intended to put themselves in a more favourable situation for prosecuting the voyage from *Dublin* to *British North America*, and not merely and solely to fulfil the warranty; but that at the time when the vessel quitted the dock they knew it was impossible to get to sea that day. Judgment having been entered for the plaintiff on that verdict, a writ of error was brought; the points stated on the part of the plaintiff in error being, that the *Cyclops* did sail for *Quebec* after the 15th of *August*, and, consequently, that the warranty was not complied with; that hauling the vessel out of dock and warping her half a mile down the river on the 15th, when the captain knew it was impossible to proceed to sea, was not a *sailing* within the meaning of the warranty. For the defendant in error, the point stated was, that the going out of the dock, and proceeding down the river, as found in the special verdict, was a sailing on the 15th *August* within the terms of the warranty.

Cresswell for the insurer, the plaintiff in error. This judgment should be reversed, for the warranty not to sail for *British North America* after the 15th *August* 1831, was not fulfilled. "A warranty in a policy of insurance is a condition, or a contingency, and unless it be performed there is no contract. It is perfectly immaterial for what purpose a warranty is introduced; but being inserted, the contract does not exist, unless it be literally complied with; per Lord *Mansfield*, in *De Hahn* v. *Hartley* (*a*). Now this ship was in harbour at *Dublin* on the 15th, and protected by the policy there; she, therefore, did not sail till after that day. That she was ready for sea and cleared, makes no

(*a*) 1 T. R. 343.

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difference, if she was prevented by *stress of weather* fro so doing, *Hore* v. *Whitmore* (*a*). [Lord *Denman* C. The question is, whether she sailed or not on the 15t of *August*, so as to satisfy the warranty? It must b assumed, that if from whatever cause she did not sa in due time, the warranty would not be complie with.] Sailing *at* a place is not sailing *from* it; to sai is to sail *on the voyage*; to depart, must be to depa from some particular place, per *Gibbs* C. J. in *Moi* v. *Royal Exchange Assurance Company* (*b*). *Bond* v *Nutt* (*c*), the first case on the point, is very differen from the present; that was a policy on a ship "at an from" *Jamaica* to *London*, warranted to have saile on or before 1st *August* 1776. The vessel sailed fro one port in *Jamaica* for another in the same islan for convoy, and the warranty was held to be satisfied for she sailed for *England, viâ* the second port, th being a proper course and no deviation: so that she wa considered to have sailed from *Jamaica* when she le her first port in that island. *Moir* v. *Royal Exchang Assurance Company* shows that a warranty "to de part" before a certain day, means not merely to breal ground, but fairly to set forward on the voyage. Ha this warranty been to "depart" on or before the 15t *August*, would it have been broken by moving the shi on that day in harbour, as was here done?] [*Little dale* J. This warranty does not require the ship t leave the harbour of *Dublin*.] In *Thelluson* v. *Fergusson* (*d*) the voyage insured was "at and from *Guadaloupe* to *Havre*, warranted to sail on or before th 31st of *December*." The ship took in a complet lading and provisions for *France*, and all her clearance and papers at *Pointe a Pitre*, in *Guadaloupe*, and sailed from thence on the 24th *October* for *Basse-terre*, th

(*a*) Cowp. 784.
(*b*) 6 Taunt. 241.
(*c*) Cowp. 601.
(*d*) Douglas, 361.

French governor's residence, in order to join convoy. There being no convoy till after 31st *December*, the ship was not permitted to depart. The court held that the sailing was bonâ fide from *Pointe a Pitre*. *Wright* v. *Shiffner* (a) shows that a warranty to sail is to sail from the loading port; weighing anchor is no where laid down to be a compliance with a warranty to sail. *Lang* v. *Anderdon* (b) shows that the ship had not left her loading port. That insurance was, "at and from *Demarara* to *London*, warranted to sail from *Demarara* on or before the 1st of *August* 1823." The ship having completed her cargo sailed on that day beyond the mouth of the river to a shoal, where the tide being too low to cross with a full loading, she anchored, and did not cross it, or discharge her pilot, till the 3d. That was held a "sailing" on the 1st *August*; and Lord *Tenterden* said, "it was contended that the words 'from *Demarara*' must have the same sense in every case, and must, therefore, be construed to mean, 'sail from the outside of this shoal;' and if that part of the sea, which lies at the outside of the shoal, was, in a popular or general sense, part of *Demarara*, this argument would prevail. But the fact appears otherwise." Again, he said, "if the outside of this shoal had been part of the port of the ship's departure, as in any popular and general sense, a part of *Demarara*, we should have thought the warranty not complied with." The anchorage taken up in the *Liffey* was part of the port of the ship's departure. The mere warping down the river within the port, was no more a compliance with the warranty than setting of sail would have been. Had the warranty been "to sail after the 15th of *August*," it would have been complied with. [*Littledale* J. Suppose the warranty to have been that the ship should not "proceed on

(a) 11 East, 515. (b) 3 B. & Cr. 495.

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her voyage after the 15th *August*, would you contend that it meant the same as "not to depart" after that time?] Yes; this ship did "not depart on her voyage" until after the day warranted. [*Littledale* J. Your argument is, that sailing *for British America* means "*from* the port" of *Dublin*. Suppose there had been a contract by the master to carry goods to *Halifax* safely, and the ship had been lost in any part of the *Liffey*, would you say he would have been liable to the loss?] Yes, from the time he took charge of them. [*Littledale* J. Then would it not satisfy this warranty, that the vessel commenced her voyage at any place in the *Liffey*, viz. by leaving her moorings with a full cargo and proceeding down the river on the 15th? *Vaughan* B. You argue, that "for" is synonymous with "from;" and you seek to introduce the word "from" into the policy. *Patteson* J. As this is not a warranty not to sail *from Dublin* after 15th *January* I do not see why the ship might not sail on her voyage while in that port. *Littledale* J. She may be "sailing" when she is at the port.] In *Nelson* v. *Salvador* (*a*) it was held, that a warranty to sail "on or before a particular day," was not fulfilled if the ship did not completely unmoor on that day, though she then had her cargo on board, and being quite ready to sail was only prevented by stress of weather from so sailing. As this ship was never off her anchor on the 15th, she could hardly be said to be under weigh on that day. [*Bosanquet* J. That argument might hold had she done nothing more than merely lifting her anchor and letting it down again.] The ship was at *Dublin* on and after the 15th *August*.

Wightman, for the insured, the defendant in error, was stopped by the court.

(*a*) Moody & M. 309.

Lord DENMAN C. J., after stating the case, proceeded. We have considered this question, both in the course of the very ingenious argument addressed to us, and since its conclusion; and are of opinion that this vessel must be taken, under the circumstances stated, to have been on the 15th of *August* in the prosecution of the voyage to *North America;* for we think that in point of fact she had commenced her voyage. In order to bring it within those cases in which it has been held that the voyage had not commenced, and therefore, that the policy did not attach, Mr. *Cresswell* has been obliged to assume that there was a particular *terminus a quo* contemplated in this policy; but when we look at the terms of it, we do not find that that is warranted as a term of the policy; but being a time policy in general, the warranty is, that she shall not sail from *British North America* after the 15th of *August.* If, therefore, she was in fact in the prosecution of any voyage from any place, which voyage is not proved to have commenced after the 15th of *August,* the warranty is not broken; and as the facts appear to us clearly to show that she was in the prosecution of her voyage on the 15th of *August,* having made a movement, though in the river, for the purpose of proceeding to the sea, and over the sea to *North America,* the warranty has not been broken, and the parties are entitled to recover. That makes this case of no very general application, and distinguishes it from all those that have been before the court on former occasions; for there is no particular point from which the voyage is contemplated as commencing. If that had been so, we should have been bound to consider the effect of the word "sailing" as contradistinguished from the word "departure," which we do not feel ourselves called upon to do on the present occasion. Mr. *Cresswell* has very properly given up the point, that

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the word "sailing" can be confined to the mere technical act of hoisting the sails, or any thing of that sort; the fair question is, as he has stated, whether at the time of the loss the voyage can be said to have commenced, and whether the ship was, in truth, proceeding on her voyage to *North America*. Now, considering that there was no distinct point of commencement pointed out by this policy, we think that the vessel was in the prosecution of her voyage, and consequently within the protection of the policy.

IN THE EXCHEQUER OF PLEAS.

DIXON *against* CHAMBERS.

A promissory note for payment of 20*l.* to *B.* on demand, with lawful interest till payment, for value received. Held, that this was a note of the second class mentioned in 55 *G.* 3. c. 184. viz. payable *otherwise* than to bearer within two months after date; and therefore required only a 1*s.* 6*d.* stamp.

ASSUMPSIT by payee against the maker of a promissory note, by which the defendant "promised to pay the plaintiff on demand 20*l.* with lawful interest until payment for value received." The stamp being 1*s.* 6*d.* it was objected that it should have been a 2*s.* stamp. *Gurney* B. directed a verdict for the plaintiff. *Gunning* now moved for a new trial, citing *Keats* v. *Whieldon* (*a*), where a promissory note for 11*l.*, payable to *A. B.* on demand, was held to require a 2*s.* stamp, as a promissory note payable to "bearer on demand" within 55 *Geo.* 3. c. 184.

Per Curiam.—That case was expressly over-ruled in *Cheetham* v. *Butler* (*b*). This is a promissory note of the second class, payable *otherwise* than to bearer within two months after date.

Rule refused.

(*a*) 8 B. & Cr. 7. (*b*) 5 B. & Adol. 837.

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HEBBERT *against* THOMAS and Another.

TRESPASS for breaking and entering a certain close of the plaintiff, next adjoining certain workshops and premises in the possession of one *J. Swan* on one side thereof; and adjoining certain land in the possession of the defendant *Wm. Thomas* on the other side thereof, and situate in the parish of *St. Martin* in *Birmingham*, in the county of *Warwick*, and also two other closes of the plaintiff in the parish aforesaid, and a certain other close of the plaintiff in *Birmingham* &c. and breaking doors, gates, locks, &c. Pleas: first, not guilty; secondly, that the defendant *W. Thomas*, long before and at the several times when &c., was the lawful occupier of certain premises with the appurtenances situate in the county aforesaid, and that the said defendant *W. Thomas*, and the other occupiers of the said last-mentioned premises for the time being, for and during the full period of twenty years next before the commencement of the suit, had respectively, as of right, and without interruption, had, used, and actually enjoyed, and at the several times when &c. the defendant *W. Thomas* of right ought to have had, used, and enjoyed a certain way for himself and themselves, and his and their servants, to pass and repass on foot from a certain public street in the county aforesaid, called *Smallbrook Street*, into, through, and over the said closes in which &c. unto the said premises of him the said defendant *W. Thomas* in this plea aforesaid; and also from the said last-mentioned premises unto, into, through, over, and along the said closes in which &c. into the said public street there, at all times of the year, at his and their free will and pleasure, as to the

The plaintiff being seised in fee of certain houses and premises, with a yard and passage adjoining to each of them, demised them by parol to several tenants, who passed over the yard and passage, and used a privy and pump there in common. The plaintiff repaired the pump, but it did not appear whether the yard and passage were demised by him or not. The defendant being tenant for a long term in other premises of the plaintiff which also adjoined the yard and passage, the plaintiff brought trespass against him for breaking and entering the same. Held, that the question for the jury was not whether the plaintiff had reserved the yard and passage to himself, but whether he had ever demised it so as to part with his possession of it.

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premises of the said defendant *W. Thomas*, belong and appertaining; wherefore &c. the defendant *Thomas*, and the other defendant *R. Freeman*, as l servant and by his command, justified using the w &c. and breaking the gates, because they obstruct the way &c. which were the trespasses in the said d claration mentioned. Replication, traversing the rig of way as appertaining to a messuage and premis occupied by the defendant *W. Thomas*, as in the s cond plea; with a new assignment extra viam.

Plea to the new assignment, alleging a right of w as appertaining to a messuage and premises occupi by the defendant *W. Thomas*, as in the second ple Replication to plea to new assignment, traversing t right of way. Issue thereon.

The locus in quo was a yard and passage adjoini to certain premises in *Smallbrook Street, Birmingha* of which the plaintiff was seised in fee; and the qu tion was, whether the yard and passage were the clusive property of the plaintiff, or of the defend *Thomas;* or whether, as lessee for a long term of ye and occupier of certain other premises of the plain also adjoining the yard and passage in question, that fendant had not at least a right of passage over th A pump and privy in the yard in question were use six tenants who occupied the plaintiff's premises, and plaintiff had repaired the pump; but whether the y itself had been demised to any one of them did not pear, though the defendant insisted that the use by plaintiff's tenants showed that it had. No evidenc right of way was given by the defendants. At trial at the *Warwickshire* summer assizes in 1834, *Park* J. left it to the jury to say whether the plaint or those from whom he claimed, had, at the time demising the other premises, reserved the yard question. The jury found that he had not, and ga

a verdict for the defendants. A rule for a new trial having been obtained on the ground of misdirection,

Hill and *Humfrey* showed cause. The manner in which the locus in quo was used by the plaintiff's tenants, with the circumstances of there being a common privy and pump there, was sufficient to induce a jury to presume that the yard was demised by the plaintiff, together with the adjoining premises. Then the direction was correct.

Goulburn Serjt. *Amos* and *Gale* contrà, were stopped by the court.

Lord ABINGER C. B.—This rule must be absolute. There was no evidence that the tenants of the several houses held under any other than parol contracts. The question on the point of misdirection is, whether, in consequence of the fact of his not demising the locus in quo, the landlord must be presumed to have reserved it, or whether it passed in some indefinite manner to the tenant of each of the plaintiff's houses by his demise. My opinion is in the negative on both points. There was no evidence of a distinct contract by the plaintiff with each tenant; all that was proved was user by all of them. It therefore appears to me that this plaintiff must be presumed to have granted to each tenant an easement in the yard and passage, and not to have demised them to any one tenant; though he might have so done, reserving the easement to the other tenants. It should have been left to the jury to say, not whether the plaintiff reserved the locus in quo to himself, but whether he had ever demised it to any one tenant, or to each in such a manner as made them all tenants in common of it. Had leases been produced, and no

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reservation appeared, still no demise of the locus quo would have been shown.

PARKE B.—It is admitted that the soil and fr hold of the locus in quo must remain in the plaint till shown to have been taken out of him by demise other legal act. The presumption must be the same to his possession; for if he did not demise, no reserv tion was necessary to preserve the possession in hi But the learned judge does not appear to have directe the jury to that effect. There was no reason why h should be presumed to have demised this yard an passage to any one of his six tenants more than th other. It should rather be taken that he demised to each a house with an easement over them.

BOLLAND and GURNEY Bs. concurred.

Rule absolute.

SCOTT and Another, Assignees of a Bankrupt, *agai* WILLIAMS.

A cause and all matters in difference were referred by rule of court to an arbitrator, who awarded that a particular balance was due from the plaintiff to the defendant, but did not order the money to be paid by the plaintiff. He also awarded that the plaintiff should costs, without directing to whom. Held, that if an action would lie on this aw no attachment could be granted on it as for disobedience of the rule of court.

MOTION by *E. V. Williams* for an attachme against the plaintiff for not paying money pu suant to an award. A copy of the power of attorn to receive payment of the money awarded had be served on the plaintiff; *Laugher* v. *Laugher* (*a*). T reference was by rule of court, of the cause and matters in difference. The arbitrator awarded th

(*a*) *Ante*, Vol. I. 352.

there was a balance of 26*l.* due from the plaintiff to the defendant, but made no order to pay that sum. He also ordered that the plaintiff should pay 15*l.* as costs, without directing to whom they were to be paid.

R. V. Richards showed cause in the first instance. There can have been no contempt or disobedience of the rule of court, as there was no order to pay the money; *Edgell* v. *Dallimore* (*a*).

E. V. Williams contrà. In *Edgell* v. *Dallimore* the award found a party to be indebted, but contained no order for him to pay the money; and the court of Common Pleas refused a rule for an attachment, on the ground now taken on the other side, that as there was no order, there could be no disobedience. But an attachment is granted not for contempt of the arbitrator's order, but for disobedience of the rule of court in not abiding by the award, the meaning of which there is no reasonable ground to doubt. In *Stiles* v. *Treste* (*b*), referred to in the notes to *Veale* v. *Warner* (*c*), the award was, "that one should keep the goods, paying so much money to the other;" and the court held the award good, and its meaning to be that the money should be paid. That seems the first reported case on the subject, and must have occurred soon after the court of King's Bench begun to compel performance of an award by attachment, as for a contempt of the rule of court. [Lord *Abinger* C. B. The award there amounts to this, that one shall have the goods and the other pay the money.] *Edgell* v. *Dallimore* was cited in *Cartwright* v. *Blackworth* (*d*), in which

(*a*) 3 Bing. 634; 11 B. M. 541. *S.C.*
(*b*) 1 Siderfin, 54.
(*c*) 1 Wms. Saund. 327, *c.*
(*d*) 1 Dowl. Pr. Ca. 489.

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case *Littledale* J. held, that the arbitrator, by directing a verdict to be entered for 204*l.*, had done what was tantamount to the directing that sum to be paid by the defendant to the plaintiff.

Lord ABINGER C. B.—After *Edgell* v. *Dallimore* this rule ought not to be granted. The award may be evidence of a debt due so as to sustain an action, but as the arbitrator has not ordered the sum to be paid by the plaintiff, he has not as yet so disobeyed the rule of court as to be liable to attachment. Had the discussion been more elaborate, I might have disagreed with *Edgell* v. *Dallimore*; but I think I should not.

PARKE B.—I am bound to abide by *Edgell* v. *Dallimore*, though, were this res integra, I might not have come to the same conclusion with the court of Common Pleas; for an attachment is granted for breaking the terms of the submission in the rule of reference.

BOLLAND B.—If an action is maintainable on this award, treating it as evidence of a debt due to the defendant from the plaintiff, how can I say that an attachment ought to go for a contempt, where the arbitrator has not ordered the party to pay? I agree with *Edgell* v. *Dallimore*.

Rule refused.

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BENWELL and Another *against* HINXMAN and Another.

All matters in difference in a cause were referred to an arbitrator, by a judge's order, so as he made his award on or before a day named, or such ulterior day as he should from time to time appoint by writing under his hand, to be indorsed on the order, "and as this court or a baron might order." The arbitrator enlarged the time, but the enlargement was not confirmed by any order. Afterwards, with consent of the parties, a baron made two orders for further enlarging the time, and the award was made before the time last allowed by him had elapsed. Held, that the award was made in due time, and that the parties' consent to the baron's orders amounted to a fresh agreement by them to refer.

The award directed a sum found to be due from defendants to plaintiffs, to be paid on or before a particular day, and that upon payment of that sum all proceedings should cease. Held, that the award was final.

The arbitrator fixed a day of payment. Held, that he had exceeded his authority, and that the award was, so far only, invalid.

G. T. WHITE moved to set aside an award. On 20th *May* 1834, all matters in difference herein were referred, by order of a judge, so as the arbitrator should make his award on or before 28th *June* then next, or on or before such further or ulterior day, not exceeding 28th *July* then next ensuing, as the arbitrator should from time to time appoint and signify in writing, under his hand, to be indorsed on the said order, and as the said Court of Exchequer, or a baron thereof, might order. On 30th *May* the arbitrator enlarged the time for making his award to 28th *July*. The time was again enlarged by a baron's order on 27th *June*, by consent of parties; and again, by like consent, on 24th *July*, to 31st *December*. On the 10th *December* the arbitrator awarded that a sum of 27*l.* 4*s.* 9*d.* was due from the defendants to the plaintiffs; and ordered that sum to be paid on or before the 20th *January* then next ensuing, in full of all demands; and that upon payment of the said sum, together with all costs and expenses, all further proceedings in the cause should cease, and be no further prosecuted. *White* cited *Mason* v. *Wallis* (*a*) to show that the award was bad for want of authority in the arbitrator at the time he made it, his enlargement of the time for making the award not having been ratified by a judge's order.

(*a*) 10 B. & Cr. 107.

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[*Parke* B. In the case cited no judge's orde obtained by consent. That makes the diffe The consent of these parties, as sanctioned judge's order, amounted to a new agreement. It same in effect as if they had agreed to another of reference, which they might have done.]

Secondly, the award, upon the face of it, appea to be final. A condition is imposed on the defen that proceedings shall cease if the sum awarde costs are paid by a certain day. [*Parke* B. The trator awards a sum to be due from the defendan directs it to be paid on or before a day named. he stopped there the award would have been fina fair meaning of those words being, that if the mone paid on the day named there should be no furthe ceedings on the award or otherwise. Nothing follows qualifies the prior words. It is clear the trator did not intend his award to be conditior the payment of the money on the particular d have no doubt that the award is final.]

Thirdly, the arbitrator had no power to give payment to 20th *January*.

PARKE B.—The award is void as to that p is clearly valid as to the rest. The defendant the advantage intended him by the arbitrator.

BOLLAND and GURNEY Bs. concurring,

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COLSTON *against* BERENDS.

Middlesex was miswritten *Middesex* in the body of a writ of capias. Held, that this mistake would not justify a baron's order for discharging the defendant out of custody on entering a common appearance.

IN *Michaelmas* term last *Hoggins* moved for a rule to show cause why the writ of capias should not be amended, by inserting an *l* in the body of *Middlesex*, called *Middesex* by mistake. On application to a learned baron, at chambers, to discharge the defendant out of custody for this error, *Hodgkinson* v. *Hodgkinson* (a) was cited and relied on, as in point to show the defendant entitled to his discharge; and the baron made the order for discharging the defendant at the end of two days, unless the court should order differently. On the above motion being made,

PARKE B. said, the practice is against amending the writ; but as *Hodgkinson* v. *Hodgkinson* is much doubted, take a rule to show cause why the order of the learned baron should not be set aside.

The rule was afterwards made absolute in the same term, no cause being shown against it, and the ground on which it rested having been mentioned to the court. This case afterwards came on in another stage, and *Hodgkinson* v. *Hodgkinson* having been cited, *Parke* B. denied its authority, intimating that this court did not agree with that decision, and had overruled it.

Alderson B. made the same declaration when *Hodgkinson* v. *Hodgkinson* was cited in the argument of another case in this term.

(a) 1 Adol. & Ell. 533; see *Sutton* v. *Burgess*, *ante*, 320.

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POTTER *against* MOSS.

A motion to enter up judgment non obstante veredicto, in a cause commenced in the Common Pleas at *Lancaster*, cannot be made in banc, under 4 & 5 *Will.* 4. c. 62. s. 26.

WIGHTMAN moved to enter up judgme obstante veredicto, under s. 26. of 4 & c. 126., in an action in the Common Pleas at ter.

PARKE B.—The words of that act show have no power to grant this motion. *Bur hugh and another* (*a*).

(*a*) *Ante*, p. 221, where s. 26. is set out. *Semble*, the ap be at chambers.

END OF HILARY TERM

REPORTS OF CASES

ARGUED AND DETERMINED IN THE

COURTS OF EXCHEQUER OF PLEAS

AND

EXCHEQUER CHAMBER,

IN

Easter Term,

IN THE FIFTH YEAR OF THE REIGN OF WILLIAM IV.

MEMORANDA.

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ON the 15th of *April Thomas Starkie* Esq. of *Lincoln's Inn*, received a patent of precedency; and on the 22d *Robert Alexander* Esq. of *Lincoln's Inn*, was appointed a King's counsel. *Basil Montagu* Esq. of *Lincoln's Inn*, was also appointed a King's counsel in this term.

On the 21st *April*, Sir *John Campbell* Knt., one of the King's counsel, was sworn in his Majesty's Attorney-General, and *Robert Mounsey Rolfe* Esq., one of the King's counsel, was sworn in his Majesty's Solicitor-General, in the room of Sir *Frederick Pollock* and Sir *William Webb Follett*, who severally resigned those offices; *R. M. Rolfe* Esq. was afterwards knighted.

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On the 23d of *April* Lord *Lyndhurst* resigned the Great Seal, which was thereupon delivered to the Right Honourable Sir *Charles Christopher Pepys*, Master of the Rolls, the Right Honourable Sir *Lancelot Shadwell*, Vice-Chancellor of *England*, and the Right Honourable Sir *John Bernard Bosanquet*, one of the Justices of the Court of Common Pleas, as Lords Commissioners of the Great Seal. All their Lordships were thereupon sworn into office in the Court of Chancery.

The Right Honourable Sir *Edward Burtenshaw Sugden* Knt., having in this term resigned the office of Lord Chancellor of *Ireland*, was succeeded by the Right Honourable Lord *Plunkett*.

The ATTORNEY-GENERAL *against* TOMSETT.

The first count of an information founded on s. 45 of 6 *G*. 4. c. 108., charged the defendant with assisting "and being otherwise concerned" in unshipping goods liable to the duties of customs, those duties not having been paid or secured. The second count charged that certain goods liable to the payment of duties, which had been unshipped without their having been paid, came to the hands and possession of the defendant, he well knowing that the same had been "illegally unshipped." The last count charged that the defendant knowingly harboured, kept, and concealed certain goods liable to the payment of duties, well knowing that the same were goods which had been "illegally unshipped." The proof was, that foreign silk had been received from a boat in the *Downs*, a mile or two from shore, within the limits of the port of *Dover*, as assigned by the commissioners acting under 13 & 14 *Car*. 2. c. 11. by the master of a hoy, which being on its voyage to *London*, the defendant had hired so to receive it. When brought by the hoy into the *Thames* they were seized within the port of *London*. Verdict for the crown. Held, first, that it was borne out by the evidence; for the defendant being within the *United Kingdom*, viz. at *Dover*, was concerned in the "unshipping" by having hired the master of the hoy to receive the goods on board. Second, that supposing the place where the unshipment was made not to be within "the *United Kingdom*" in the sense intended by 6 *Geo*. 4. c. 108. s. 45., still that when the master of the hoy, acting as the defendant's agent, brought the silk into the port of *London*, the defendant was properly charged in the second count with having them in his possession.

The crown has a right to the reply on a motion for a new trial after verdict for the crown.

count that the defendant, at *Ratcliffe*, in the county of *Middlesex*, was assisting and otherwise concerned in unshipping from a certain vessel, divers goods, to wit, 39,822 ells of foreign manufactured silk &c., the said silk &c. being then and there goods liable to the payment of duties of customs, the said duties of customs for the same not having been first paid or secured, contrary to the form of the statute in such case made and provided. The second count charged that certain other goods, to wit, 39,822 ells of foreign manufactured silk, &c., the said silk &c. being goods liable to the payment of duties, which had been then and there unshipped without the duties thereon having been first paid or secured, contrary to the form of the statute &c., came to the hands and possession of the defendant, he well knowing at the same time when the said last-mentioned goods so came to his hands and possession, that the same had been illegally unshipped as aforesaid, contrary to the form of the statute in such case made and provided. The third count charged that defendant on &c., at &c., did knowingly harbour, keep, and conceal, and did knowingly permit and suffer to be harboured, kept, and concealed, certain other goods, to wit, 39,822 ells of foreign manufactured silk &c., the said silk &c. being goods liable to the payment of duties, he the said defendant, when he so harboured, kept, and concealed, and so permitted &c. to be harboured &c. the same goods, well knowing that the same and every part thereof were goods that had been illegally unshipped as aforesaid, to wit, at *Ratcliffe* aforesaid, contrary to the form of the statute &c. Plea: not guilty. At the trial before *Alderson* B. at the sittings after *Michaelmas* term 1834, it was proved that during the passage of a vessel through the *Downs* on her voyage to *London*, and while she was about two

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miles from shore, the silk in question (a) was unshipp from her and transferred by her boat to a *Dover* h hired by the defendant to receive it. The place whe this was done was within the limits of the port of *Dov* as described in the return of the commissioners a pointed under stat. 13 & 14 *Car. 2.* c. 11., which w produced for the crown. The hoy having proceede into the *Thames* with the silk on board concealed i the ballast, it was there seized by the officers c customs. Verdict for the crown. A rule for a nev trial was afterwards granted on a point taken at th trial, that there had been no illegal unshipment of th silk in question, it not having taken place in the "*Unite Kingdom*" but on the high seas, in a place wher though within the king's "dominions," the commi sioners appointed under stat. 13 & 14 *Car. 2.* c. 11. assign the limits of the port of *Dover*, had no juri diction. Cause was shown in *Hilary* term by

Sir *William W. Follett*, Solicitor-General, *Tanc* and *Kaye* for the crown. By 6 *Geo.* 4. c. 108. s. 4 "every person who shall, either in the *United Kingd* or in the *Isle of Man*, assist or be otherwise concern in the unshipping of any goods which are prohibite or the duties for which have not been paid or secure or who shall knowingly harbour, keep, or conceal, shall knowingly permit or suffer to be harboured, ke or concealed, any goods which have been illegally u shipped without payment of duties, or which have be illegally removed without payment of the same, fro any warehouse or place of security in which they m have been originally deposited, or shall knowing harbour, keep, or conceal, or permit or suffer to harboured, kept, or concealed, any goods prohibited

(a) Being restricted goods. See 3 & 4 *W.* 4. c. 52. s. 58., and 1 T. Gr. 51.

e treble value thereof, or the penalty of 100l.,
lection of the commissioners of his majesty's
" This silk was imported into the *United*
s, and was liable to duty on that importation,
. c. 111. s. 2.(*a*); for the precise time of the im-
i is the time at which the ship importing ac-
mes within the limits of the port at which she
n due course be reported; 6 *G.* 4. c. 107.
. The duties then accrue, and as the silk was
he limits of the port of *Dover* at the time of
ng it into the *Dover* hoy, that unshipment was
he duties not being paid. The section on
e information is founded applies, even if the
ent took place on the high seas out of the
Kingdom; for if the defendant, being within the
Kingdom, assisted or was "otherwise con-
in the unshipment out of it, that would support
ge. But in this instance the place of unship-
s within the *United Kingdom*, being within the
the port of *Dover*, as set out by the commis-
under 13 & 14 *Car.* 2. c. 11. s. 14. Their
as only to assign the limits of the ports within
dom of *England*. Now the narrow seas have
en considered wholly within it (*c*). Nor is it

4. c. 111. was repealed from 1st *September* 1833, by 3 & 4
. s. 1. The parallel provision in force is 3 & 4 *W.* 4. c. 56. s. 2.

ther goods on board a ship at a spot twenty mile
the *Hope*, and out of the body of any county, bu
the limits assigned to the port of *London* under 1
Car. 2. could be seized as "imported;" and it w
that they might. The defendant not being a fo
cannot deny the extent of this kingdom. At all
the second count is supported by the evidence,
being in the defendant's possession in *London*, 1
of his agent the master of the hoy, who knew th
had been unshipped in order to be laid on lan
out payment of duty.

Platt and *W. Clarkson* in support of the rule.
tion 45 of 6 *G.* 4. c. 108. includes "every perso
foreigners as well as *British* subjects, the forme
be liable to this information. The question is, w
that *illegal* unshipment of goods within the "
Kingdom" is shown which is provided against by
and charged in the information. The enactm
13 *Car.* 2. gave no jurisdiction to extend the
existing limits of ports, or to alter the ancient bou
of the kingdom. Its object was merely to fix
landing places goods imported might be uns
Lord *Hale* says, "The narrow sea adjoining
coast of *England* is part of the coast and demes

dominions of the king of *England*, whether it lie within the body of any county or not;" but so are the colonies, without being part of the kingdom of *England*; for if they were they would be within some county. It seemed plain to Lord *Hale* (*a*) that the duties of ancient customs did not grow due merely by the importation into the narrow seas, though part of the king's dominions. The warrants of the chief justice of the King's Bench, tested "*England* to wit," have no authority beyond the division line between high and low-water mark, *e. g.* in the *Downs*, without the "silver oar" of the admiralty jurisdiction. The coast, *i. e.* low-water mark, seems considered by the legislature the verge of the kingdom of *England*; 6 *Geo.* 4. c. 108. s. 2. (*b*). [*Bolland* B. That act, by prohibiting particular vessels from navigating within four leagues from the *coast* of that part of the *United Kingdom* which lies between the *North Foreland* and *Beachey Head*, intended to prohibit the taking smuggled goods into a coasting vessel at sea. *Gurney* B. This is not laid to be a coasting vessel; but the unshipment may have been illegal.]

After objection taken to the right of the Solicitor-General to reply on a motion for a new trial, the court held in favour of that right, relying on *Attorney-General* v. *Courtice* (*c*).

The *Solicitor-General* in reply. The meaning of the terms "port" and "limits of the port," as occurring in 6 *Geo.* 4. c. 107., is not confined to that which is within low-water mark. Ports in common understanding include a large portion of the high seas. If the port must be within the kingdom the legislature may bind a

(*a*) Treatise, concerning the Customs, c. 20; Hargrave's Tracts, 216, 8vo. ed.

(*b*) The act in force is 3 & 4 W. 4. c. 53. s. 2.

(*c*) 9 Price, 456.

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British subject by enacting that goods should not be unshipped within a certain distance round the port [*Parke* B. Can the unshipment be illegal without a putting on land? 8 *Ann.* c. 7. s. 17. which prohibited goods from being "unshipped with intent to be laid on land," is repealed by 6 *G.* 4. c. 105.] It is submitted that it was virtually re-enacted by 6 *Geo.* 4. c. 107 s. 2 (*a*), which prohibits breaking bulk before report and entry of the goods.

Cur. adv. vult.

The judgment of the court was afterwards delivered in this term by

PARKE B. who, after stating the information, and *Geo.* 4. c. 107. s. 45. proceeded thus:—These goods were received from a boat into a *Dover* hoy in the course of her voyage to *London*, off *Deal*, a mile or two from shore, within the limits of the port of *Dover*, as these limits are set out by the commissioners, under statute 13 & 14 *Car.* 2. c. 11.

They were brought into the *Thames* in the *Dover* vessel, and were there seized by the officers of the customs.

The objection taken by the counsel for the defendant is, that this is not an 'unshipping' forbidden by the statute law, being upon the high seas; whereas the unshipping ought to be in the united kingdom, and within the body of some county. We do not consider it necessary to decide, on the present occasion, whether the unshipping within the limits of the port of *Dover*, assigned by order of the king's commission, would be an unshipping in the United Kingdom within the meaning of the statute; because it was proved that the defendant at *Dover*, and therefore clearly within

(*a*) And see now 3 & 4 *Will.* 4. c. 52. s. 2.

the United Kingdom in the narrowest sense of these words, was "*concerned* in the unshipping," inasmuch as he there hired the master of the hoy to take the foreign silk on board, which, in pursuance of that hiring, he afterwards did; and we think that there is no doubt, but that the unshipping it from the boat to the hoy, with a view of laying it on land without paying the duties, and no duties having been paid or secured, is an illegal "unshipment" within the meaning of this section.

But even supposing that the defendant's act of assistance or concern in the unshipment must be considered to have taken place through the agency of the master of the hoy, at the place where the unshipment was made, and that such place was not "in the United Kingdom," in the sense ascribed to those words in the section in question, there seems to us to be no doubt but that the offence described in the second count has been committed; for the goods were seized in the body of a county, in the possession of the master of the hoy, who was, for this purpose, the defendant's agent; and the master knew that they had been unshipped with intent to be laid on land, and without the payment of duties, and that such duties had not been paid or secured.

If this construction be not correct, and to bring this case within the section, the unshipment itself must be within some county, the consequence would be, that in a great many cases the penalty would not attach; for if unqustomed goods were actually seized on shore in the hands of a person who had himself unshipped them, he would not, according to the defendant's argument, be liable if such unshipment had taken place, as it often does, on the open coast, whilst the vessel itself, from which they are unshipped, is afloat, or on the sea, and not within the common law jurisdiction of a county.

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We, therefore, think that the rule which has been obtained for a new trial must be discharged.

Rule discharged.

As to this case see *Attorney General* v. *Greaves*, 1 Tyr. & Gr. 48, *et seq.*

BOTHEROYD, Administrator of REBECCA SHADDICK, *against* WOOLLEY.

A. being tenant in fee, died in *January* 1833, during the currency of several *Lady-day* and *May-day* tenancies from year to year, without having given notices to quit in due time, and devised to *B.* for life, who died in *August* 1833, after the expiration of those years of the tenancies, which were current at the death of testator, and within the first half year of the fresh tenancies:—Held, that the administrator of *B.*, the devisee for life, could not recover that portion of the rent which became due between *January* 1833 and *August* 1833, under 11 *Geo.* 2. c. 19. s. 15.: for both the tenancies running during that time were created not by her but by the tenant in fee, and did not therefore determine with her life.

ASSUMPSIT for money had and received by the defendant to the plaintiff's use. The facts were that *Adam Shaddick* died in *January* 1833, seised in fee of certain premises at *Manchester*, and devised to his wife, *Rebecca*, an estate for life in them. They were in the hands of tenants, who held from year to year, their terms beginning at various periods, viz. some from *Lady-day*, and others from *May-day* in each year. The devisee for life having died in the *August* of the same year, the question was, whether the plaintiff, as her administrator, was entitled to recover from the defendant, who had received the rents, an apportionment of rent, under 11 *Geo.* 2. c. 19. s. 15., for the time elapsed since *Lady-day* and *May-day* in that year. The plaintiff contended that the tenancies "determined on the death of the tenant for life," (the devisee), on the ground that the tenancies from year to year had, in the words of the statute, ended with the current year and commenced afresh with the beginning of the new ones in *March* and *May* 1833. The plaintiff, however, was nonsuited at the last *Lancashire* assizes, with

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) to him to move to enter a verdict. *Cresswell* moved rdingly, citing *Brown* v. *Candler* (*a*). But,

r *Curiam*, (Lord *Abinger*, *Parke*, *Bolland*, and rson, Bs.)—The tenancies in question were created former year during the life of *Adam Shaddick*, was seised in fee. The omission of notice at the *aelmas* and on the 1st of *November* 1832, to quit e *Lady-day* and *May-day* following, was tanta- it to an implied demise by *Adam Shaddick* for ano- year, to commence at the latter days. The tenant fe created by his will did not in fact demise on the nentioned days, for she could not prevent their ng. It is better to adhere to the words of the te than to give it a forced construction.

Rule refused.

) At the Rolls, not yet reported. See *Neale* v. *Mackenzie*, *post*.

MORRIS *against* SMITH.

LLER moved to set aside a writ of summons for irregularity, on the ground that the defendant r an attorney, his addition "gentleman" was not ed in the writ, or in the copy served; but he was described as "of *Paper Buildings*, in the *Inner le*."

The defendant's addition need not be inserted in a writ of summons, under 2 *Will.* 4. c. 39. sched. No. 1.

r *Curiam*.—The form of direction of a writ of ons, as provided by the act 2 *Will.* 4. c. 39., l. No. 1, is, "To *C. D.* of &c., in the county of reeting." That form does not expressly require the dant's addition or whole designation. The ad-

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dition might be useful for the purpose of distinguishing the defendant from another person; but no difficulty as to identity is here suggested. The &c. only requires the residence which is here given.

Rule refused.

JOURDAIN *against* JOHNSON.

The form provided by *Reg. G. T.* 1 *W.* 4. and entitled, "Common Counts," constitutes separate counts, as well for the purposes of pleading as of taxation of costs. (See *Reg. Gen. of Pleading, Hil.* 4 *W.* 4. No. 5.)

A declaration in assumpsit contained a count on a bill and the "common counts" provided by *Reg. Gen. Trin.* 1 *W.* 4. claiming 100*l.* as due to plaintiff for money paid, 100*l.* for money lent, 100*l.* for goods sold, and 100*l.* on an account stated. Pleas: first, as to the *first* count and as to 12*l.* 2*s.* parcel of the sum of 100*l.* in the *second* count of the declaration alleged to be due from defendant to plaintiff for goods sold, and as to the 100*l.* in the *second* count alleged to have been found due from defendant to plaintiff on an account stated, that the plaintiff paid into court 51*l.* 9*s.* 7*d.*, and that the plaintiff hath not sustained damages to a greater amount than that sum in respect of *so much* of the causes of action in the declaration mentioned, as were before specified in the plea. There was a second plea non-assumpsit as to the residue.

Quære, if the special plea was bad on special demurrer, for not showing distinctly, what part of the 51*l.* 9*s.* 7*d.* paid into court was to be applied to satisfy the bill of exchange?

ASSUMPSIT by the indorsee against the drawer of a bill of exchange for 31*l.* 14*s.* 3*d.* After the count on the bill followed matter alleging, pursuant to No. [illegible] of the general rules of pleading *Hil.* 4 *W.* 4. and the concise form given under the title "Common Counts," in *Reg. Gen. Trin.* 1 *W.* 4. [*ante*, Vol. I. 530. "And whereas the defendant," on a day named, was indebted to the plaintiff in 100*l.* for money paid by plaintiff for the use of defendant at his request, and a like claim of 100*l.* for money lent; 100*l.* for goods sold and delivered; 20*l.* for interest, and 100*l.* on an account stated, concluding thus, as directed by that rule: "and whereas the defendant on &c., in consideration of the premises *respectively*, then and there promised to pay the said several monies to the plaintiff on request, yet he hath disregarded his promises, and has not paid any of the said monies, or any part thereof,

to the plaintiff's damage of 100*l.*" &c. Pleas: first, as to the *first* count of the declaration, and as to 12*l.* 2*s.*, parcel of the sum of 100*l.* in the *second* count of the declaration alleged to be due from the defendant to the plaintiff, for the price and value of goods sold and delivered to the defendant at his request; and as to the sum of 100*l.* in the second count of the declaration alleged to have been found to be due from the defendant to the plaintiff on an account stated between them, and the promises alleged to have been made by the defendant in respect thereof, that the plaintiff ought not further to maintain his action in respect thereof, because the defendant now brings into court the sum of 51*l.* 9*s.* 7*d.* ready to be paid to the plaintiff, and the defendant says that the plaintiff hath not sustained damages to a greater amount than the said sum of 51*l.* 9*s.* 7*d.* "in respect of *so much* of the causes of action in the declaration mentioned as are above specified and set forth." Verification and prayer of judgment. Secondly, non-assumpsit to the residue of the causes of action in the declaration (*a*). Demurrer to first plea, showing for causes of demurrer to it, that the said defendant has pleaded payment into court of 51*l.* 9*s.* 7*d.*, in satisfaction of the sum of 31*l.* 14*s.* 3*d.* specified in the first count of the declaration, and of the sum of 12*l.* 2*s.* parcel of the said sum of 100*l.* for goods sold and delivered, as stated in the declaration, and of the full sum of 100*l.* stated in the declaration to be due from the defendant to the plaintiff on an account stated between them, which said mentioned several sums of money amount to the sum of 143*l.* 16*s.* 3*d.* whereby the defendant has

(a) This plea not being demurred to, did not appear on the demurrer book, Reg. Gen. Exch. *Mich.* 9 *G.* 4. [Vol. I. App. p. xi.], but was admitted to have been pleaded.

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pleaded the payment into court of a less sum in faction of a greater; and also that the defendant not in his said plea set forth what portions of said sum of 51*l.* 9*s.* 7*d.* were intended to be pa each of the said several causes of action, to whic payment of that sum is made applicable, as in that mentioned; and that the defendant has not plead each of the second, third, fourth, fifth, and sixth c of the said declaration separately, as he ought to done, so that the plaintiff cannot tell how much of of the said causes of action are put in issue; an said defendant has pleaded to and stated the se third, fourth, fifth, and last counts of the said de tion, as if the same constituted merely one c count, and the said plea is in other respects u tain &c.

Joinder in demurrer.

W. H. Watson in support of the demurrer (*a*). v. *Sutton* (*b*) is a distinct authority to show that ac ance of a smaller sum in satisfaction of a greater deb is no discharge of the latter debt (*c*). This plea t fore would be clearly bad before the general rev of pleading, *Hil.* 4 *W.* 4. No. 17. [*ante*, Vol. IV. p which permitted a defendant to plead the payn money into court. But the form here adopted sanctioned by that rule; for by the usual practice

(*a*) As this case involves points very useful in practice, it was advisable to give it the earliest possible insertion, though aft *Trinity* term 1835. *Roberts* v. *Williams* and *Cousens* v. *Padden* ar in this number for a like reason. These three cases were argued in term 1835, and received the judgment of the court in Michaelm 1835.

(*b*) 5 East, 230. See 2 T. R. 24.

(*c*) Except by deed; 5 East, 230; 2 B. & Cr. 481, 482.

t was made, the pleas ought to have been payment into ourt as to 31*l.* 14*s.* 3*d.*, and non-assumpsit as to the esidue. [Lord *Abinger* C. B. That would certainly e so in debt, but there is a difference in assumpsit; r though a defendant may have promised to pay 100*l.* does not follow that the damages exceed 50*l.*, for he ay have paid the residue. There is no difference in is respect in assumpsit. There the party pleads, not the *damages* sought to be recovered for non-payment of the sum demanded, that the plaintiff was not amaged thereby, *Thomas* v. *Heathorn*(*a*); but to the um itself demanded, as *e.g.* that he did not promise c. The issue raised by the plea of payment since he new rules is the same as that formerly raised on he plea of non-assumpsit. Besides, though the action of assumpsit sounds in damages, the indebitatus assumpsit counts for the consideration of this bill n goods and money, are not for *unliquidated* damages. [Lord *Abinger* C. B. In *Thomas* v. *Heathorn* the plea did not add that the plaintiff had sustained no damages *ultra*, as is here done. Though this s confessedly a plea in an unusual form, is it bad?] t in fact alleges that the plaintiff has not sustained damages over and above 51*l.* 9*s.* 7*d.* in respect of that part of the causes of action in the declaration, as to which he pays money into court. The plea should have been payment into court as to 50*l.*, and as to he residue non-assumpsit. The effect of the payment f money into court is the same as before the new rules allowed it to be pleaded, viz. the amount is considered as being struck out of the declaration, and then he plea of non-assumpsit would have covered the rest f the claim; that plea is only an enlargement of the plea of tender. Suppose the plaintiff to reply that he

(*a*) 2 B. & Cr. 477.

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had sustained damages above the 51*l.* 9*s.* 7*d.*, could h show those damages to have accrued from the oth breaches, or from the non-payment of that sum? [Lo *Abinger* C. B. Suppose that before the new rule t defendant had pleaded that the plaintiff had not su tained damage, by the breach of promise laid, beyo 100*l.*, which sum he tendered?] That would ha been said to amount to the general issue (*a*). [Lo *Abinger* C. B. So in substance this plea amounts the form given by the new rule No. 17, though t words are in an inverted order.] That rule only a plies to cases of unliquidated damages, which this not.

Secondly, the pleas are only to the first and seco counts of the declaration. Now there are several oth common counts, and all but the second are uns swered.

Hoggins in support of the pleas. For the purpo of pleading, the new common counts provided by general rule cited form but one count; and it is by express rule of court, that, for the purposes of ing costs only, they are to be considered seps counts. There is only one breach and one pro in respect of the claim on the bill, and on the counts. But if they are separate counts, the sp plea applies itself to each sum of 100*l.* claimed in of them. It alleges, that as to 51*l.*, part of the 10 the first common count, and so in the rest of the defendant pays 51*l.* 12*s.* 2*d.* into court, and sa his last plea, that he made no promises as to t sidue. In like manner the plea applies to the s 31*l.* 14*s.* and 12*l.* 2*s.* The defendant, by his plea, admits the cause of action in respect of th

(*a*) And see *Hume* v. *Peploe*, 8 East, 168.

ned, but denies that damage has been sustained l the amount paid into court. If the plaintiff is ermitted in his declaration to enlarge the real ie by the contract to a greater sum, then a de- t should be suffered to bring it back, by his plea, ue amount. Here, by limiting the three amounts, taken on himself to specify the causes of action ed by the plaintiff. The question is, whether a *right* to do so? [Lord *Abinger* C. B. Sup- e plaintiff to prove at the trial that his real cause on on the second count was of a larger amount e 12*l.* 2*s.* in the plea?] That would be a ques- *amount* only, and as the defendant had taken self to define it, but had fixed it too low, the ff would have recovered on the issue, had he not ed by his demurrer that the three amounts were in fact; so that no such difficulty arises here.

son in reply. The defendant only denies that es have accrued to the plaintiff beyond the sum to court. Now the plaintiff might be prevented stablishing further damage by various defences, ought to have been specially pleaded, *e. g.* pay- release, &c. If the *debt* is confessed by the he plaintiff may recover damages ultra, *e. g.* for t, &c., without any count for it. Now this plea be taken to mean that there is no *debt* beyond *l.* 9*s.* 7*d.* paid into court, but merely that the ff cannot recover *damages* (*e. g.* interest) beyond m. [*Alderson* B. Does the sum fixed in an tatus count, being in this instance 100*l.*, mean ing more than some sum *not exceeding* that t? If we take it so for the plaintiff, must not we e the plea in like manner for the defendant? would then be no inconsistency. The damages in this case exceed the amount of the sum

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claimed, that being 800*l.* and the damages 100*l.* onl The plea extends to the whole amount in the count a the bill; but, as to the other counts, I apprehend means "not exceeding" the amount there mentione It must be presumed, from the form of plea of payme of money into court provided by the new rules, that was intended to be pleaded to part of the declarati only; for the *actionem non* is made a part of it, and No. 9 of the pleading rules [*ante*, Vol. IV. p. xii.] a tionem non is not necessary where the pleading is i tended in bar of the whole action generally (*a*). [*Al derson* B. Actionem non means that the plaintiff neve had a right to maintain an action, but this is a plea to the further maintenance of it.] That is, of the whol action. But the plea is clearly bad for treating the common counts as one count. Taking them as dis tinct, there is no plea to any count but the first an second. [Lord *Abinger* C. B. The matter here i question may form more than one count; but a singl promise to pay in respect of several causes of action and a single breach of that promise, may make on count only (*b*)]. Formerly the counts were separate with a separate promise to each; and are allowed b the new rule in the latter part only. The pleading rul itself speaks of counts and promises in the plural.

Cur. adv. vult. Lord *Abinger* intimating that th court would confer with the other judges.

In *Michaelmas* term 1835 the judgment of the cou was delivered by

Lord ABINGER C. B.—(His lordship, after stating th

(*a*) The prayer of judgment declared unnecessary by the same rule und the same circumstances, is annexed to the authorized form of plea of pay ment into court: and see *Sharman* v. *Stevenson*, *post*, 564.

(*b*) See 2 Saund. 121 *c*. n. (1); and *post*, 534.

pleadings, proceeded thus:)—This case was argued before my brothers *Bolland*, *Alderson*, and *Gurney*, and myself, in *Trinity* term. The objections made to the plea on the argument, were two; first, that a less sum of money was paid into court, in satisfaction of a greater certain pecuniary claim, admitted by the plea, and that the sum paid into court as to each debt is not stated; and, secondly, that the declaration consists of six counts, and not of two, the plea having been framed on the latter supposition; this being pointed out as a cause of special demurrer.

With respect to the first objection, if this had been a plea of payment into court of the sum of 51*l.* 9*s.* 7*d.*, or a less sum, to the whole declaration, except to that part which relates to the bill, it would have been good, for the sums claimed in the declaration are all of them liquidated damages, so as to admit of a payment of money into court; but the plaintiff is not bound to prove himself entitled to the precise sums alleged, in order to recover; and the defendant, by pleading payment of money into court on such a declaration, though he thereby admits that he did enter into contracts with the plaintiff for money paid, money lent, goods sold, interest, and on an account stated, does not admit that any precise sum was ever due to the plaintiff upon such contracts; still less the exact sum mentioned in the declaration: he only admits that some amount of liquidated damages had become due, but denies that plaintiff was ever entitled to recover more, by way of such damages, than the sum paid into court.

The plea would therefore be good so far as relates to the whole of the declaration, except the claim on the bill of exchange; then is it necessary to specify how much is paid in on one part, and how much on another? It would be extremely inconvenient to defendants to be more restricted in that respect, than they were under the old

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practice of paying money into court on the common rule, in place of which this plea is framed; and as it was the constant practice to pay one sum of money into court generally on all the counts, we see no reason why this may not be equally done under the new rule.

If then a plea of payment of 51*l.* 9*s.* 7*d.* into court on *all* the demands, except that on the bill of exchange, would be good, there is not the least ground for saying that it would not be good as to *part* of those demands. Upon the plea, in this case, it must be intended that the defendant knowing for what precise demands the plaintiff is proceeding under this general form, (which an order for particulars always enables him to do,) means to dispute, under the plea of non assumpsit, all the demands for money paid, lent, and interest, and all for goods sold, except for a parcel in respect of which 12*l.* 2*s.* is claimed; and to admit liability as to that parcel of goods, and on an account stated, but to contest the amount of liquidated damages for such admitted liability.

The count on the bill creates some difficulty. Supposing that to an action on a bill of exchange, there was a plea of payment into court of a less sum than the amount alleged to be due on the bill, it might be objected that the plea admitted the larger ascertained sum to be primâ facie due from the defendant, but that the part paid could not satisfy the whole of that sum; and that the plea contained no answer or ground of defence as to the remainder. For if the plea of payment of money into court should be considered in the nature of a plea of non assumpsit as to the residue not paid into court, it would be inapplicable to a bill of exchange, as to which a plea of non assumpsit is inadmissible; the record would contain no proper answer as to the residue, unless there was an allegation of some special ground of defence in that respect, as part payment, or failure of considera-

on as to part. It is, therefore, very questionable whether such a plea would be good, and also questionable whether it is made good by the plea of payment into court on the whole declaration, of a larger sum than the amount of the bill; for so much as would cover that amount is not necessarily to be ascribed to the bill. We do not, however, find it necessary to decide this point, as we are of opinion in favour of the plaintiff, on the second ground, but shall permit defendant to amend his plea; the objection, if it is wrong, may be removed by payment into court of a certain sum, to cover the amount of the bill and interest.

The court think that the last ground of special demurrer must prevail, and that the several demands on the bill of exchange, and for money paid, lent, and advanced, and interest and account stated, in a declaration in this form, are to be considered different counts. This declaration is framed in compliance with the rule of court, *Trin.* 1 *Will.* 4., in which the demands in indebitatus assumpsit, in the form there prescribed, are not treated as one but as several counts. They are called common counts, and, in effect, not one sum, as the amount of all the demands, but several sums, and not one consideration and promise, but several, are stated; for there is an averment of a promise to pay each sum respectively, in consideration of the plaintiff being indebted in *that* sum; and if the demands for money paid, &c. are to be treated as one count, the *whole* declaration must be so considered, as the demand on the bill of exchange stands on no different footing from those for money paid, lent, goods sold, interest, and on the account stated. If the concluding part contains but one promise, it certainly covers the whole declaration, and all is *one* count. We think, however, for the reasons above given, that these demands constitute *several* counts; and there will be a greater convenience

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in practice in so treating them, as where the defendant means to plead severally to each part of the declaration, it will be much more concise and simple to designate such parts as counts, than as parts of counts; in which latter case nearly the whole of the matter intended to be answered must be recited in the preamble of the plea (*a*). The rule of court, *Hil. T. 4 Will. 4.*, orders, that where several debts are alleged in indebitatus assumpsit to be due in respect of several matters, the statement of each debt is to be considered as amounting to a "several" count within the meaning of the rule which forbids the use of several counts, though one promise to pay only is alleged in consideration of all the debts. This rule has been, on some occasions, considered as implying that they are so only for this purpose; and on the argument of this case we believe an intimation of opinion was given to that effect; on consideration, however, we think that it does not necessarily follow from this provision, that they are not separate counts for other purposes also, when framed in the manner in which these are. This clause meets every case of several debts, and treats them as being within the rule forbidding the use of several counts; and if a count were now to be framed, as it used sometimes to be, on the plan recommended by the learned editor of *Saunders* (*b*), and all the debts for money paid, &c. clearly stated to form part of one entire consideration, with one promise only, still these separate debts would, under this rule, be deemed to be several counts, though they would not be so deemed in pleading. For these reasons we think that the demurrer must prevail; but it is a case in which undoubtedly the defendant must have liberty to amend.

(*a*) As to this, see per *Parke* B. in *Mills* v. *Oddy*, *post*, 571; *Mee* v. *Tomlinson*, K. B. *Mich.* 1835. *J. Bayley* for the plaintiff; *Addison* for defendant. And see *post*, 550.

(*b*) Vol. ii, 121 *c.* n. (1).

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COUSENS *against* PADDON.

DEBT for goods sold and delivered, work and labour, and on an account stated. The aggregate of the sums demanded was 1500*l.* The defendant pleaded, first, that he was never indebted; secondly, as to certain parcel of the sum demanded, to wit, 38*l.*, that the defendant paid and the plaintiff accepted a certain sum, to wit, 338*l.*, in full satisfaction and discharge of the said certain parcel of the sum demanded, to wit, the sum of 338*l.*; thirdly, as to 500*l.* parcel of the sum demanded, a set-off for money paid. By his replications, the plaintiff joined issue on the first plea, traversed the payment and acceptance in the second, and the debt alleged by way of set-off in the last. The plaintiff by his particulars claimed 396*l.* 12*s.* for 330,000 bricks, at 24*s.* the thousand. At the trial at the last *Hampshire* assizes, the plaintiff's demand appeared to be for bricks made by him for the defendant,

Where there is a special contract for goods to be furnished, or work to be done, at a fixed price, and the declaration consists of the common counts in debt on simple contract, for goods sold and delivered, and for work and labour; to which the defendant pleads that he never was indebted, he may prove, as well since the new rules of pleading *Hil.* 4 *W.* 4., Nos. I. & II., as before, that the goods delivered were not of the quality contracted for, or that the work was done in an improper manner.

In order to entitle the defendant to a verdict on an entire plea of payment to an indebitatus count in debt on simple contract, payment of the sum specified in the plea, though laid under a *vis.*, must be proved. But either plea may be taken distributively, so as to find the issue for the defendant as to the sum, whatever it may be, that is proved to have been paid, and for the plaintiff as to the rest. The like law seems to apply to the plea of set-off.

Semble, what is matter for a plea of payment will not sustain a plea of set-off.

In debt for goods sold and delivered, and work and labour done, the pleas were, first, nunquam indebitatus; secondly, as to parcel of the sum demanded, to wit, 38*l.*, payment of 338*l.* in discharge of that parcel; thirdly, a set-off for money paid. The plaintiff proved a special contract for "good, sound, saleable bricks," to be made for him by the defendant, at a certain price per thousand, and delivery of as many thousands as, at that price, amounted to 396*l.* The defendant failed in making out a payment of 338*l.*, as laid in the second plea; only proving 314*l.* to have been paid. He proved a set-off of 21*l.*, and also that the bricks delivered were of bad quality. The jury found that the value of the bricks delivered did not exceed the 335*l.*, viz. the 314*l.* which had been paid, and the 21*l.* which the defendant was entitled to set off against the plaintiff's demand. On a special finding of these facts under 3 & 4 *W.* 4. c. 42. s. 24. the court directed a verdict to be entered for the defendant on the plea of nunquam indebitatus, as to the whole sum demanded, except 335*l.*:—for the defendant on the plea of payment as to 314*l.*; and as to the residue for the plaintiff; for the defendant on the plea of set-off as to 21*l.*, and as to the residue for the plaintiff: so as to give the defendant judgment on the whole record.

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and delivered to him on a specific contract to furnis "good, sound, saleable bricks," at 24*s.* a thousand. A many bricks had been delivered to the defendant a amounted to 396*l.* 12*s.* at the contract price and quality. He had kept them some time, and sold part without ev offering to return any (*a*). For the defendant, it w opened, that the quality of the bricks was not equal that contracted for, and that they were badly ma It was then objected for the plaintiff, that the defe ant could not give such matter in evidence at all bef the late rules, nor since, without a special plea Mr. Justice *Patteson*, however, ruled that the evide offered was admissible, on the plea that he was n indebted. The inferior quality of the bricks was cordingly established for the defendant, who proved several payments to the plaintiff on acco amounting to 314*l.* 3*s.*, and a set-off of 21*l.* for m paid to his use, making together 335*l.* 3*s.* This sum fa ing short of the 338*l.* alleged in the plea of payment, was objected for the plaintiff, that the latter sum, bei a sum certain, fixed by the plea, the plea could not supported without showing the whole amount of 33 to have been paid. *Patteson* J. inclined to assent to th argument, but also seemed to think that the actual pa ment might be given in evidence on the general issu The defendant then applied to amend the second pl by altering the sum there laid from 338*l.* to 314*l.* 3*s.*, but the learned judge hesitated whether he had pow to do so under 3 & 4 *Will.* 4. c. 42. s. 23., and left i to the jury to find whether the sum which the defendan ought to have paid on a quantum meruit for the brick

(*a*) See as to this *Poulton* v. *Lattimore*, 9 B. & Cr. 259; and authoritie collected in *Street* v. *Blay*, 2 Bar. & Adol. 456.

(*b*) See *Allen* v. *Cameron*, *ante*, Vol. III. 907; *Chappel* v. *Hicks*, Vol IV. 43; *Duncan* v. *Blundell*, 3 Stark. C. N. P. 6; *Street* v. *Blay*, 2 Ba & Adol. 456.

delivered exceeded 335*l.* 3*s.* or not. They answered that it did not. They judge then directed a verdict to be entered for the plaintiff for 1*s.* on all the issues, a special finding of the facts by the jury, under s. 24 of 3 & 4 *Will.* 4. c. 42. with leave to the defendant to move to enter a verdict for him, as this court should direct, if they should be of opinion either that the second plea was made out, or that it should have been amended at nisi prius. In *Easter* term *Dampier* moved accordingly. To a question from the court, he answered, that the 21*l.* mentioned in the plea of set-off, was paid by direction of the plaintiff to a third person. [*Parke* B. If it was not agreed by the parties that the sum thus paid was to be in part payment of the plaintiff's demand, it is the subject of a plea of set-off, which is very different in character and effect from that of payment.] *Dampier* then stated the questions to be, first, whether on nunquam indebitatus the defendant could give in evidence the bad quality of the bricks delivered, either as an answer to the action, or in reduction of damages; secondly, whether payment of the actual sum of 338*l.* laid in the second plea must be specifically proved, or whether only a smaller sum need be made out. A rule was granted to enter up judgment for the defendant on the second and third pleas.

Bompas Serjt. for the plaintiff, afterwards obtained a cross rule to increase the damages to 54*l.* 4*s.* 9*d.*, viz. if the plaintiff was entitled to recover the residue according to the contract price of the bricks, in consequence of evidence of their bad quality having been improperly received on the first plea. Both rules came on together in *Trinity* term (*a*), but *Dampier's* having been first granted,

(*a*) See note to *Jourdain* v. *Johnson*, *ante*, 526.

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Erle and *Crowder* for the plaintiff, showed cause. The defendant could not, even before the new rule, defend the action on the ground that the bricks were ill made. A specific contract was made for them at 24*s*. a thousand, at which rate a large quantity, amounting to 396*l*. 12*s*., was made and delivered to the defendant, who kept them and sold some from time to time, paying money to the plaintiff on account of them, without complaint or returning any. He was therefore precluded from passing over the special contract, and disputing the quality of the goods in reduction of damages; for he could only do that, had the claim been on a quantum meruit (*a*). [*Parke* B. The acquiescence of the defendant is evidence that the work was properly done, but evidence only (*b*). *Basten* v. *Butter* (*c*) settled the law on this subject. It is an implied part of the special contract that the bricks should be made in a workmanlike manner; if they were not so made, the plaintiff can only go on a quantum meruit.] A specific warranty of goods sold, as that seed sold was new growing seed, would differ the case. *Poulton* v. *Lattimore* (*d*). [*Parke* B. That plaintiff was only a seller of the goods, but where, as here, the plaintiff is himself the workman, there is an implied warranty that the article shall be made in a workmanlike manner. Whether that ought not to have been specially pleaded, is another consideration.] The only plea is, that the defendant never was indebted. Then how, since the new rule of pleading in assumpsit, No. 1, s. 1., can he give evidence of the bad quality of the article sold, a defence resting on the plaintiff's non-performance of his contract, without pleading specially? In *Roffey* v. *Smith* (*e*) it was held, that if there has been

(*a*) See Serjt. *Williams*'s note to *Webber* v. *Tivill*, 2 Saund. 122, a; *Ellis* v. *Hamlyn*, 3 Taunt. 52; *Chappel* v. *Hickes*, *ante*, Vol. IV. 43.

(*b*) See the cases cited in p. 536, n.

(*c*) 7 East, 479.

(*d*) 9 B. & Cr. 259.

(*e*) 6 C. & P. 662.

to give evidence of a special contract, or to go on a
ım meruit. Then if the defence, to be available,
be specially pleaded, that must be because the
t is a demand on a special contract. Were that
: plaintiff would be out of court, for the finding in
is, that the bricks were of workmanship inferior
contract. *Parke* B. The question is, whether
general indebitatus count you may not inquire
:r a warranty implied by law has been complied
The defendant gave notice to the plaintiff of
ention to rely on the special contract (*a*). The
ant must be taken to have been conusant of the
its existence, and also that there was no other
n him and the plaintiff; so that he should have
ly pleaded it, and the general form of the in-
us count could not mislead him. The rule
to the fact of the contract, not to the form of
ıg it. In *Basten* v. *Butter* Lord *Ellenborough*
Where a specific sum has been agreed to be
y the defendant, the plaintiff may have some
to complain of surprise in evidence being ad-
to show that the work done and materials pro-
rere not worth so much as was contracted to be
because he may only come prepared to prove
eement for the specific sum and the work done,
notice be given to prove that the payment is dis-

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makes no difference to the legal rights of partie pleadings. That subject has been considered *Basten* v. *Butter* was decided. Each side m taken to know the law, and to prepare for all ev which is admissible under a particular issue. plaintiff was not compelled to declare specia setting out the contract, but might have done desirous to confine the defendant to a particula for the contract in fact could only have been der pleading nunquam indebitatus. The difficulty from the relaxation of the rules of pleading, by al the plaintiff under a general indebitatus cou manding a sum certain, to show himself entitle quantum meruit. That having been done (*a*), n this defendant deny what the law implies to be the general contract stated in the declaration, vi such goods as were contracted for were deliv The court will take judicial notice that partic demand must now be delivered to a defendant w declaration; *Reg. Gen. Trin.* 1 *W.* 4. No. 6. direction to enter a verdict for the plaintiff on th of payment, was correct, for the plea confesses of 338*l.*, and sets up an avoidance of that debt w not established; for as only 314*l.* appears to hav paid, the rest is admitted to remain due to the p Issue being joined on the precise point, whet specific sum of 338*l.* was paid, it was determined plaintiff's favour. So, though the plea of set-of the plaintiff to be indebted to the defendant in a sum than is demanded by the plaintiff, still, on ant's failing to do so, that issue is found again Though payments in part may without doubt sidered by a jury in mitigation of damages up general issue, whether the defendant fails or a plea of payment, these pleas are pleaded o

(*a*) 2 Saund. 122, n. (2).

part of the action, and the plaintiff is entitled to damages on the other parts.

Nor was this a case in which the judge could amend, not being one in which the proof of the contract varied from the allegation, but a necessary and guarded statement in pleading, stating to what part of the demand the plea was to apply. Nor will its being under a *videlicet* make any difference.

Dampier and *Smirke* for the defendant. First, as to the defendant's right to show the work bad under the general issue. [*Parke* B. We are all of opinion, that, independently of the new rules, a defendant had a right to prove, under the old general issue, that the goods delivered were not of the quality which they should have been, in order to entitle the plaintiff to avail himself of a special contract under the general indebitatus count. After considering all the cases together, it seems well settled, that if the work or goods supplied are not of that quality or character for which the law implies the parties to have contracted, the plaintiff is put to his quantum meruit, and the defendant may show that he was not liable to pay the price stipulated.] The new rules of pleading *Hil.* 4 *W.* 4. Nos. I. and II. do not alter this point, so that the evidence is admissible on the new plea of nunquam indebitatus. The contract being at so much for every thousand bricks, the plaintiff was only entitled to recover for each thousand which were "good, sound, and saleable;" *Forster* v. *Taylor* (*a*). Had he declared specially, he must have alleged that they were so; which the defendant might then have traversed by plea. By declaring in the indebitatus he alleges a delivery, pursuant to contract with the defendant, of goods of a quality from which the law would imply the

(a) 5 B. & Adol. 893.

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defendant's promise to pay for them on request. H any express contract been alleged by the plaintiff, t plea of "never indebted" would have traversed it. all events it denies the "matters of fact (*i. e.* in t instance the plaintiff's work and labour) from whi the contract or promise alleged may be implied by lav For the sound bricks stipulated for were not de vered. The plea is not merely in confession a avoidance, but in absolute bar of the contract relied by the plaintiff for work in making bricks; for it deni it to be one from which a promise to pay on requ could be implied. No cause of action has ever existe for the work was never properly done. Then *Roff* v. *Smith* does not apply. [*Parke* B. Where the dec ration is on a contract implied by law, the new ru enable the defendant to deny the facts from which su promise would arise. The plaintiff is thus prevent from recovering a specific sum on a special contra and the contract implied by law being for the delive of goods, the defendant may deny it, or show that point of fact no such goods as the plaintiff contracted deliver were delivered (*a*).] It is true, that since t new rules it was decided in *Edmunds* v. *Harris* (that upon the plea of non assumpsit to an indebitat count for goods sold, a defendant could not prove th to be sold on a credit not yet expired. The case w also questioned in this court in *Taylor* v. *Hilary* (and appears to have been decided, not so much by t new rule itself, as by the example given in it. Aga in *Alexander* v. *Gardner* (*d*) it was held by the court Common Pleas, that where the general issue only w

(*a*) See *Bridge* v. *Wain*, 2 Stark. C.N.P. 504; *Yeats* v. *Pim*, 6 Tau 446; 2 Marsh. 141. *S. C.*; *Gray* v. *Cox*, 4 B. & Cr. 108.

(*b*) 2 Adol. & Ell. 414. (*c*) *Ante*, p. 373.

(*d*) 1 Scott, 281; *S.C.* 1 Bingh. N. C. 671; 3 Dowl. P. C. 146.

pleaded to an indebitatus count for goods bargained and sold, the defendant might prove the existence of a special contract, subject to conditions which had not been complied with. [*Parke* B. The plaintiff is bound to prove such a sale and delivery as will raise a debt payable on request. The defendant here denies that such bricks as by the contract were to be delivered, and for which the plaintiff was to have 24*s*. a thousand, were in fact delivered. He could not plead specially, for he could not tell that the plaintiff did not intend to go on the quantum meruit.] The plaintiff, by adopting the quantum meruit, has taken on himself a liability to this defence in this shape. The effect of the new rules was to bring back the old law of pleading ex post facto defences, which, admitting the plaintiff to have once had a cause of action, seek to avoid his further maintaining it; *Paramore* v. *Johnson* (*a*). The cases collected in *Vin. Abr.* tit. *Evidence* (Z. a.) show that it was first held in the last century, that the general issue non assumpsit put the plaintiff on proving a subsisting contract at the time of bringing his action, and enabled the defendant to give in evidence all matters in discharge of such debt.

As to the plea of payment and that of set-off, since *Lord* v. *Houstoun* (*b*) and *Mac Quillin* v. *Cox* (*c*), a plaintiff in debt on simple contract is no longer bound to prove the precise sum demanded in pleading, but is permitted to prove that a different sum is due. Then if the defendant who pleads payment of a sum stated, is not also let loose to meet the possible new case of the plaintiff, by proving payment of a sum differing from that stated in the plea, it would follow that the plaintiff might demand 1000*l*. and prove 1*l*. only, while the defendant might plead a payment of 1000*l*. and fail if he proved it only as to 999*l*. The plea lies in evidence as

(*a*) 1 Lord Raym. 566. (*b*) 11 East, 62. (*c*) 1 H. Bla. 249.

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well as the demand, and must vary with it. The rule seems to have been, that where the plaintiff was bound to prove the precise sum laid in his declaration, as in case of a bond or covenant, the defendant must make out with equal precision that stated in his plea, for it could not otherwise be an answer; and that where the plaintiff was not so tied down, the defendant was also left at large in like manner. In *Browne's Vade Mecum*, 92., a plea occurs to a declaration in assumpsit for use and occupation, in which is pleaded a payment of "28*l.* 12*s.* 4*d.* for the third part of the aforesaid rent of 85*l.* 17*s.* 4*d.* in the said declaration mentioned, which the plaintiff accepted for the third part of the said rent, in full discharge of the said promises of the said defendant." The replication denies the payment, and it is said that there was a verdict and judgment for the defendant. In 2 *Brown's Entries*, 6, appears a declaration on five promises to pay five different sums of money, amounting to 390*l.* A plea confessing the promise alleged, but avoiding it by payment of "the said several sums of money, amounting in the whole to the said sum of 390*l.*, according to the said several promises and undertakings, &c." (*a*). Replication, denying such payment. According to the contrary reasoning, a failure to prove payment of more than four sums would have been fatal to the defendant for want of pleading severally to each. Though a sum certain must be mentioned in pleading, the proof need not be equally precise. In *Robinson's Entries*, 55, is a plea of payment to the plaintiff of "all the sums of money due to him," and a replication denying the payment. That however might be bad for want of showing a sum certain (*b*). A tender is not perfectly analogous, for it is a single act done at one time. Nor is that plea

(*a*) See also Clift. Ent. 203.

(*b*) Com. Dig. tit. Pleader, (2 G. 15.) (E. 5.); citing *Anon.* Marsh. 7.

admitted without a distinct admission of the debt, and cannot be joined with any other plea, but must be excepted out of the general issue. Again, it fixes the sum in a peculiar way, for the amount must be paid into court. In trespass it is enough if a defendant proves as much of a plea of justification as covers the plaintiff's proof; *Redford* v. *Birley* (*a*). Even judgment by default in debt does not necessarily confess the sum demanded, so as to dispense in every instance with a writ of inquiry. [*Parke* B. That appears to have been the opinion of *Holroyd* J. in *Arden* v. *Connell* (*b*), but the practice is otherwise.] The same reasoning appears to show that the whole defence is open on the plea of set-off. [*Parke* B. If a sum is the subject of a plea of payment it cannot be treated as a set-off.] The statutes of set-off limit the operation of the plea to the precise sum laid in it. It could not be pleaded alone without the general issue, because the precise debt is not claimed in the court, and the plaintiff might be misled; then it must be pleaded to part, particularly in debt, where the demand is of the aggregate of the sums laid in all the counts. A plea by an executor of retainer or payment to other creditors, does not bind him to prove the exact sum pleaded. The general issue compelled the plaintiff to prove what was due on the contract, and he must be taken to know what had been paid him in part as well as the defendant, but having given no credit for it in his particulars. As the general issue put him on proving the whole, he could not have been misled or injured by the amendment proposed.

(*a*) 3 Stark. C. N. P. 83.

(*b*) 5 B. & Ald. 885. See also, by the same learned Judge, *Brill* v. *Neale*, 1 Chit. R. 627; and again in K. B., 26th *April* 1825, *Littledale* J. concurring, *Tyr.* MSS. See per *Le Blanc* J., 14 East, 442; also 2 Marsh. R. 57. Doug. 316; 5 T. R. 87; 7 T. R. 446; 1 Bing. 182; 2 B. & Ald. 118.

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PARKE B. (a).—The only point on which we need take time to consider is on the effect of the pleas of payment and set-off, particularly the former. The first question is, whether they can be taken distributively. This is a point of great importance since the new rules of pleading, which compel a defendant to plead specially.

On the other point, we all concur that where there was a contract for a specific sum, and the general issue was pleaded to an indebitatus count, a defendant might by the old law show that the work done was not that which was stipulated for, or that the goods delivered were not such as were contracted for. Nor do we entertain any doubt that the defendant may give the same facts in evidence since the new rules. On non assumpsit or nunquam indebitatus, *i. e.* upon such a plea to the common count for the price of goods sold, he may show either that there was no contract of purchase and sale, or no delivery in fact; or that if there was a partial delivery, the goods were not such as made him liable on the contract. Again, in an action for work and labour and materials supplied, he may show the one to be so ill done, and the quality of the other to be so bad, as would not render him liable to pay for them under the contract. He is then liable to pay on a different contract, that of a quantum meruit. The other question, whether the judge could amend at nisi prius, will arise if we should hold that the precise sum alleged to be paid must be proved. The rule for increasing the damages must be discharged. On the other rule

Cur. adv. vult.

PARKE B. delivered the judgment of the court in *Michaelmas* term 1835; and after stating the pleadings

(a) Lord *Abinger* was sitting in equity.

and the facts proceeded thus.—This case was fully argued before my brothers *Bolland*, *Alderson*, *Gurney*, and myself, during the last term; and as the question is of great importance since the late rules of pleading compelling a defendant to plead specially, we took time in order to give the subject full consideration. The first question is, whether the defendant is entitled to a verdict upon the issue on the second plea altogether, or as to the 314*l.* 3*s.*, part of the sum therein mentioned? the verdict as to the residue being found for the plaintiff. It appears to us that the defendant is not entitled to a verdict on the whole plea; the plea contains an admission that a certain parcel of the debt was due, and in order to support the whole plea, *that* parcel must be proved to have been paid, and that parcel is by the introductory part of the plea stated to be 338*l.* It is true it is so stated under a *videlicet*; but it is perfectly clear that the addition of a *videlicet* cannot render a material averment immaterial; *Grimwood* v. *Barrett* (*a*); and there is no doubt that the sum mentioned in the plea is material, for the plea must state how much of the demand it proposes to answer. On a demurrer to this plea, for not stating that part with certainty, the answer would have been, that it was so stated, and that the *videlicet* made no difference.

For this reason we are of opinion that the defendant cannot have a verdict on the whole plea.

But we think that the plea may be taken distributively, and found as to part for the defendant, and not for the plaintiff.

The general rule is, that a plea is an entire thing, and bad altogether if disproved in part; but to this there are exceptions which have been long established. For instance, on a plea of plene administravit,

(a) 6 T. R. 460.

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though assets unadministered are shown to be in the defendant's hands, and so the plea is disproved, yet the judgment for the plaintiff is only for the part unadministered (a). So on a plea of judgment recovered against the testator in an action against an executor and no assets ultra, it is not enough to disprove a single judgment. So where two executors join in a plea of plene administravit, and assets are proved to be in the hands of one only. All these are instances where from the nature of the case the plea is not entire; and the question is, whether the present case falls within the same principle. If this had been an action of indebitatus assumpsit, there could, we think, have been no doubt, but that the plea would have been divisible. A plea of payment is not usual in assumpsit; but pleas of set-off and the statute of limitations, which are very common, are, we believe, almost invariably pleaded to the whole declaration; and yet if the debts due to the defendant do not cover the whole demand, or the whole of the causes of action did not accrue beyond six years, and the residue in both cases is answered under the general issue, the defendant has always judgment on the whole record: so if there be a plea of the general issue and bankruptcy to the whole declaration, and part of the demand is answered on the general issue and part by the defendant's certificate, the course is the same. This can be only on the ground that such pleas to a declaration of this general nature, which may and often do comprise many distinct contracts in point of fact, are capable of being severed and applied to each portion of the demand, in like manner as if there were several distinct pleas, one to each of such portions respectively; for if, in the cases above stated, the plea of set-off, of the statute of limitations, and of b

(a) 1 Saund. 336.

ruptcy, were entire, and if disproved in part were bad altogether, then as they are each pleaded to the *whole* declaration, and are proved only as to part of it, the consequence would be, that the plaintiff would be entitled to a verdict upon the issues on each of these pleas. It seldom happened before the late rules that there was any occasion in these cases to make any other entry on the record than a general finding for the defendant, and judgment for the defendant on both issues; but since the costs of each issue now follow the event of the issue, there can be no doubt but that the proper entry in such cases would be on the general issue for the defendant, as to all but £——, (the sum covered by the proof under the special plea), and on the special plea, so far as related to that sum, for the defendant; and as to the residue on both issues for the plaintiff.

If this be so, there is no reason why, upon a special plea of payment in indebitatus assumpsit, the same course should not be pursued. Such a plea does not mean that the defendant paid one certain fixed sum at a certain time, but that he did, either in one sum at one time, or in several sums at different times, pay the whole of the plaintiff's demand. When the plea is so understood, there is nothing contradictory in holding that the issue might be found as to part for the plaintiff, and part for the defendant. The remaining question then is, whether there is any difference between these cases and similar pleas to an action of debt on simple contract. Whilst it was considered to be the law, that an action of debt on simple contract was founded on one entire single contract, and that the plaintiff could not recover less than the whole, doubtless a special plea of payment was also entire; and if the full amount was not proved to be paid, the plaintiff was entitled to a verdict; but since it has been clearly

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established by several cases, viz. *Walker* v. *Witter* (*a*), and *Rudder* v. *Price* (*b*), that the demand in such an action is divisible, and the plaintiff may recover less; and since several contracts may certainly be included in a demand of one sum in an action of debt on simple contract, as well as in indebitatus assumpsit; and since a plea of payment, whether pleaded to a declaration in one form of action or the other, must have the same meaning, and does not of necessity import that one entire sum was paid at one time, we do not see any satisfactory reason why it may not be considered as capable of being severed in one case as well as the other, whether pleaded to the whole declaration, or, as in the present case, to part. Indeed it would seem to follow as a consequence of the decisions above referred to, that in both forms of action its effect should be the same. The only difference between the two actions will therefore be, that in an action of assumpsit, the plea to the whole declaration admits no certain sum to have been originally due from the defendant to the plaintiff; whilst the plea to the whole declaration in debt admits the sum nominally claimed to have been originally due; and a plea to a part admits that part to have been due: but in either case, we think the verdict may be found for the defendant, for the whole, or for the part actually paid, according to the fact.

This decision will be productive of great practical convenience, as under the new rules of pleading payment must be pleaded specially; and unless the plea be divisible, the defendant must either multiply his pleas, by pleading to each portion of the demand separately, or he must be driven to the necessity of applying to amend on the trial, under the 3 & 4 *W.* 4. c. 42. s. 23. in case any part of the plea should not be proved. The verdict must be entered on the plea of payment, so far

(*a*) Doug. 6. (*b*) 1 H. Bla. 550.

as relates to the sum of 314*l.* 3*s.*, for the defendant; on the plea of set-off, so far as relates to the sum of 2 *l.*, for the defendant; and on the plea of nunquam indebitatus, to the whole sum demanded, except 335*l.* 3*s.*, for the defendant, and for the residue on each plea for the plaintiff. The result is, that the defendant will have judgment on the whole record.

Judgment accordingly.

STANCLIFFE *against* HARDWICK.

TROVER for two horses. Plea: not guilty. At the trial at the *Lancashire* summer assizes in 1835, it appeared that by agreement between the plaintiff and defendant they had set up a waggon as carriers in partnership, each furnishing two horses. The concern having been dissolved, the plaintiff got back his horses, but the defendant being pressed to pay debts owing by the partnership, afterwards seized and sold them. For the defendant it was proposed to give in evidence the above facts to show the existence of a partnership with the plaintiff, and that the horses were seized and sold as partnership property, so that trover would not lie against him. For the plaintiff it was objected, that the plea of not guilty admitted the plaintiff's title to sue; and that since *Reg. Gen. Hil.* 4 *W.* 4. No. III. [*Ante*, Vol. IV. p. xvi.] it could not

Since the new rules of pleading in case, *Hil.* 4 *W.* 4. No. IV., the defendant, by pleading not guilty singly, admits that the plaintiff has some property in the goods as between him and the defendant, upon which he would be able to recover against the defendant: but will not be thereby prevented from proving that he is tenant in common with the plaintiff.

But where there has been an actual conversion, as by seizure, sale, and application of the proceeds, the defendant must, in order to justify such conversion in fact, as tenant in common with the plaintiff, plead that fact specially in confession and avoidance.

Since the new rules of pleading, the conversion which is put in issue is not a wrongful conversion merely, but a conversion in fact; so that if such actual conversion is insisted on as lawful, the defendant must confess and avoid it in a special plea, setting forth the title in right of which he justifies the conversion.

Quære, whether a defendant, who has not converted the goods in fact, but has merely refused to deliver them upon demand, must plead a right of lien specially?

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be proved that the property in the horses was in an one else without a special plea. *Gurney* B. being this opinion, and refusing to reserve the point, t plaintiff recovered a verdict for the value of the hors *Cresswell* moved for a new trial in last *Michaelmas* ter on the ground of rejection of evidence. He conten that the evidence operated to deny the guilt of conversion, and to set up a right of dealing with property. [Lord *Lyndhurst* C. B. The defend denies exclusive property in the plaintiff, and sets up joint property in himself and the plaintiff.] A r having been granted,

Wightman for the plaintiff showed cause in *Michae mas* term. The new rule of pleading provides that "i an action for converting the plaintiff's goods, the co version only, and not the plaintiff's title to the goods shall be put in issue by the plea of not guilty." It wi be said, that upon not guilty pleaded, the defendan could show that he was joint tenant of the chattel wit the plaintiff; which proof would disprove the conversio by the defendant, and not the plaintiff's title. But th reason why one joint tenant or tenant in common of chattel cannot sue another in trover unless for de stroying it, is, that as both are seised *per mie et per tou* each has an equal property in it, and neither can b guilty of converting his own (*a*). But it is submitte that the evidence offered did in fact go, not to deny th conversion only, but also the plaintiff's title to the so right of property; and that under a special plea on could the plaintiff's title be shown to be such as wou in point of law prevent him from suing, by showing th defendant to be incapable of the conversion charge Here the conversion which is traversed might ha been shown to have taken place, *e. g.* by the destr

(*a*) See cases collected 1 Chitt. on Pl. 4th ed. 67.

tion of the chattels; but the plaintiff was unprepared for proof of title in some one else. [*Parke* B. In an action by the plaintiff against any third person he could only have recovered in damages the amount of his share.] If this defendant could say upon the general issue there was no conversion, because the horses were his, so might a stranger. [*Alderson* B. You put a case inconsistent with any conversion at all, viz. one in which the whole property is in the defendant. But it may be that there has been such a particular conversion here, as, though not total, would enable the plaintiff to sue.] Then the plaintiff, if sole owner, must still be prepared to prove his whole title on the general issue; or, if joint owner only, he must show the property to have been destroyed. In *Hartfort v. Jones and others* (a), it was held, that a plea in trover that the defendants detained wrecked goods till paid for their pains in saving them, was bad, for if the detainer be lawful no conversion was confessed; but had it been confessed in fact, the plea would show the defendants to be justified in dealing with the goods as they had done. [*Parke* B. Should not this defence have been pleaded specially in confession and avoidance? Had there been only a demand and refusal, then it may be that evidence of the tenancy in common might have been admitted under the general issue, to explain the refusal and show that there was no conversion. It must be recollected that in this case an actual conversion by seizure, sale, and application of proceeds was proved; whereas mere demand and refusal would only be evidence of it, and might be disproved under the general issue. Then as the new rule of pleading in case, No. IV. sect. 2. requires matters of confession and avoidance to be pleaded specially, in case

(a) 2 Lord Raym. 393; *S.C.* 2 Salk. 654. Lord *Holt* there says, he never knew but one special plea good in trover, viz. Yelv. 198.

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as well as assumpsit, should not the defendant ha pleaded specially, admitting that the horses were t plaintiff's property, and that he (defendant) took the confessing and avoiding the defendant's appropriat to his own use?] The answer to that question m depend on this, whether such a plea would not amo to the general issue, as well since, as before the rules of pleading; and whether the defendant co have alleged this defence in any proper form other than the general issue. He could have pleaded a goo special plea, and was therefore bound to do so. For as a tenant in common or joint tenant cannot be guil of a conversion of the property held jointly or common, unless he destroys it, it would be a go plea to this action to state that the defendant, at th time of the supposed conversion, was tenant in commo with the plaintiff, and did not destroy the chattel hel in common. Indeed it is doubtful whether the latte averment of the destruction of the chattel would b necessary; for it might lie on the plaintiff to reply an prove that; for the general rule being that a tenant i common cannot be guilty of a conversion, because h has as good a right to the exclusive possession of it a the other, the destruction of the chattel is the exceptio to that rule. At all events the plea first suggeste would show the destruction. In trover several circum stances must concur to enable the plaintiff to recover he must make out his right to the property and th possession, and a conversion by the defendant (a). I either is disproved the action fails; then proof that th plaintiff is a tenant in common will show that the plai tiff cannot maintain an action, and throws it on him prove destruction. [*Parke* B. All that is stated in th declaration is, that the plaintiff has some property in th

(a) *Ploxam* v. *Saunders*, 4 B. & C. 941.

rses, not that he has it all. The conversion complained of is the taking, and the question is, whether since the new rules it can be shown to be lawful under the plea of not guilty, which, while it admits that the plaintiff has some title against the defendant, so as under some circumstances to enable him to maintain the action; puts in issue the conversion, which is the subject-matter of the defence. *Alderson* B. Might not the defendant have pleaded that he was joint tenant with the plaintiff, and as such, took the goods and converted them to the use of the partnership, averring that to be the grievance complained of?] That plea would be bad for going to the title as well as the conversion. *Ascue* v. *Sanderson* (a), and *Foxley* v. *Annesley* (b), show that a plea in trover denying the seizure, but not the conversion, is bad on that ground. [*Parke* B. *Kenicot* v. *Bogan* (c) is contrary to that case. The principal point discussed on most of the special pleas in trover has been whether they did not amount to the general issue. The question comes to this, whether the words "the conversion only," as used in the new rules, mean a wrongful act, as conversion formerly did in pleading. It could not be confessed and avoided, and the general issue would be the only plea. It may be urged for the plaintiff, that this word as used in the plea involves no wrongful act, but only the exercise of actual dominion over and dealing with the goods, which the defendant should have confessed and avoided by alleging his right to possession as joint tenant.] Conversion is now construed to be a mere taking, and as such might be confessed and avoided. So, if the defence is merely founded on the want of sufficient property in the plaintiff to sue.

(a) Cro. El. 434, and see Lord Raym. 393. (b) Cro. El. 694.
(c) Yelv. 198.

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Cresswell and *Baines* contrà. It was proposed the trial not to deny the plaintiff's title to the hors or to set up a property in them in the defendant, b to establish his rights as a partner to deal with the in a way which would prevent the possibility of being guilty of a conversion. That was to "deny conversion" upon the general issue, as permitted the new rules. Where one of two partners becam insolvent, and his assignees sued the other in trov it was held that no action would lie, because th could have been no conversion (*a*), not because t plaintiffs had not a property; *Smith* v. *Stokes* (*b*). [*A derson* B. Suppose the act relied on as a conversio was the sale of horses under the plaintiff's own autho rity to sell, could not the defendant give in evidenc such a relation with the plaintiff by partnership as pu an end to the possibility of the conversion charged? In *Kenicot* v. *Bogan* (*c*) the defendant had taken th plaintiff's wines against his will, whereas this de fendant deals with the horses by authority of his part nership with the plaintiff. Unless that partnershi could be given in evidence, at least in mitigation o damages, a joint tenant might recover in trover fo more than his interest in the joint property, notwith standing *Sedgwick* v. *Overend* (*d*). A defence reste on the partnership of the plaintiff and defendan would not deny the conversion. [*Parke* B. No, bu it would confess and avoid it; was not that requisite? A conversion being taken in law to be wrongful, coul not be confessed and avoided, but must be denied, fo which the general issue properly serves. As to th necessity to plead in confession and avoidance, it

(*a*) See s. 323 of Littleton; Coke's Comm. 200; and *Brown* v. *Hod* 1 Salk. 290, cited by Lord *Mansfield*, in *For* v. *Hanbury*, Cowp. 450.

(*b*) 1 East, 363. 368.

(*c*) Yelverton, 193.

(*d*) 6 T. R. 766.

very doubtful whether this defence could have been so pleaded before the new rules; and if so, they make no difference, for they only mean to provide that all matters formerly the subject of special pleas should remain so. The word "conversion," in the new rules, has the same meaning it always had, viz. a wrongful act; and if so, the plea proposed on the other side does not amount to a confessing it to be wrongful; whereas the general issue, by denying a conversion, denies in effect that a wrongful act was committed by the defendant, and enables him to prove any thing which shows that the act, which the plaintiff must prove to be wrongful, in order to support his action, is not so in fact. Nothing short of an act wrongful in its nature will satisfy the word "conversion." *Heath* J. says, in *Bromley* v. *Coxwell* (a), that to support an action of trover there must be a positive tortious act. *Rooke* and *Chambre* Js. agreed, resting their judgments on there being no act of conversion by the defendant, who had been only guilty of negligence. Here the title of the plaintiff need not be denied, for his title was that of the defendant, and the possession of one was that of the other. The defence is nothing more than a special denial of the conversion, and is not ordered by the new rules to be specially pleaded. Special pleas in trover were formerly held bad, for not confessing a conversion, *i. e.* a wrongful conversion; and the new rules have made no alteration in that. *Agar* v. *Lisle* (b) shows the necessity for confessing a conversion, in order to state, as matter in avoidance, a lawful cause for the taking and detainer, *e. g.* a distress for toll. The same point appears from *Salter* v. *Butler* (c); *Doe*

(a) 2 Bos. & P. 438; 2 Phill. Ev. 224; and see *Mallalieu* v. *Laugher*, 3 C. & P. 551; *M'Combie* v. *Davies*, 6 East, 538; *Ferguson* v. *Cristall*, 5 Bing. 305.

(b) Hobart, 187. (c) Noy, 46.

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v. *Bacon* (*a*), *Allen* v. *Harris* (*b*), and *Har* *Jones* (*c*). In *Kenicot* v. *Bogan* (*d*) the point taken. There the defendant did in fact confes version, and the point in dispute was, whether confessed and avoided the conversion relied on plaintiff, and they held he had. So that that is not directly contrary to *Ascue* v. *Sanderson* is also supported by the other cases cited. [*Abinger* C. B. To permit this defence on the issue would be contrary to the object of the ne which was, that parties should be sent to nis prepared to try specific and ascertained issues. new rule intended to distinguish between the titl plaintiff and the conversion, so that while the could only be disputed on a special plea, the should be left to be tried on not guilty. [*Alder* Will a plea of not guilty to an action for dive watercourse, put in issue more than the mere diverting the water? Suppose the defence to this diversion was not wrongful, because don plaintiff's direction, should it not be pleaded sp The case of nuisance put as an instance of the application of the same rule of pleading, show only the commission of the act, but its wro may be disputed under the general issue; fo action the plea of not guilty is to operate only that the defendant carried on the all "*in such a way as to be a nuisance* to the of the house," and not as a denial of th occupation. [*Parke* B. In a declaration f ing or diverting a watercourse, it is alle plaintiff to be wrongfully obstructed. Ca

(*a*) Cro. El. 435. (*b*) 2 Lutw. 1537.
(*c*) Lord Raym. 393; 2 Salk. 654. (*d*) Yelv. 19

"obstruction," in the rule of pleading, mean "wrongful" obstruction? That immediately precedes the clause as to conversion.]

Cur. adv. vult.

On the 30th *April* in this term

PARKE B. delivered the judgment of the court. To a declaration in trover the defendant pleaded not guilty, since the new rules came into operation. On the trial, he proposed to show that the plaintiff and defendant were in partnership together, and jointly interested in the goods specified in the declaration, and that the defendant took them from the plaintiff's possession, and sold them, in order to pay an outstanding partnership debt. My brother *Gurney* thought the evidence inadmissible under this plea, and rejected it, and the plaintiff had a verdict. A rule nisi for a new trial was granted, and the case has been since twice argued; once on the question, whether the defendant was precluded by the plea from disputing the plaintiff's sole right of property in the goods; and afterwards, at the suggestion of the court, on the question whether the defendant ought not to have confessed the conversion, and pleaded, by way of avoidance, his right as a partner.

Upon the first question, the court is of opinion in favour of the defendant; upon the second, against him. [After stating the rule of pleading in trover, *Hil.* 4 *W.* 4. the learned baron proceeded.] The plea of not guilty is therefore now equivalent to a plea of not guilty of the conversion; and such a plea undoubtedly admits the plaintiff's property or right of possession. The first question is, what is the extent of that admission?

For the plaintiff, it was, upon the first argument, insisted, that the sole property or right of possession is

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thereby admitted to be in the plaintiff; and that it also admitted, that he was entitled to succeed, if proved any act done by the defendant, which would a conversion, if the sole property was in the plaintiff. For the defendant it was insisted, that nothing was admitted, than that the plaintiff had some property or right of possession, as between him and the defendant; and that the defendant was not precluded on the trial from giving any evidence to disprove a conversion, which was consistent with the admission such a property. It was therefore contended, that he had a right to prove that the plaintiff had an undivided interest only; and that he himself had a similar interest, as partner with the plaintiff, by virtue of which he was authorized to do all that he did, that is, to seize and sell the goods, in order to pay the partnership debts. And we are of opinion that the defendant is right in this respect, and that he ought not to have been prevented on this ground alone from giving the proposed evidence.

That an undivided property in a chattel is a sufficient title to maintain trover against a stranger who has wrongfully dealt with it as his own, or against another tenant in common, who has destroyed it, does not admit of a question; but a stranger has always a right to prevent several actions being brought against him by different part owners for the same conversion, and may for that purpose plead in abatement the non-joinder of another part owner as co-plaintiff; if he omits to do so, the plaintiff may recover, for any injury to his undivided interest, damages co-extensive with the injury. The authorities on this subject are to be found in the case of *Addison* v. *Overend* (*a*). If then the defendant, before the new rules, instead of pleading

(*a*) 6 T. R. 766.

ing the general issue, had suffered judgment to go by default, he would have admitted no more than some property and right of possession in the plaintiff, in respect of which he was entitled to recover against the defendant; because the plaintiff would not have been bound to prove more on the general issue than such an interest, in order to maintain his action. The same would have been the case upon an assessment of damages on a special plea found against the defendant, or decided to be bad on demurrer; and no greater effect can be attributed to the admission on the record by pleading to the conversion only. It is but in the nature of a judgment by default as to the remainder; and admits the plaintiff's right to recover something against the defendant, if he can prove what the law would deem a conversion by him of the plaintiff's property of the goods in question.

Such and such only being the effect of this admission, it follows that the defendant may in his defence give any evidence relevant to the issue, and consistent with that admission; though he cannot be allowed to go into a case which is contradictory to it.

Thus he could not be permitted to show that the plaintiff was the finder of the goods, and that himself, or some one by whose order he acted, was the real owner, and therefore had a right to dispose of them to his own use; for that would be inconsistent with the admission which he has made, and a denial that the plaintiff had *any* property as against himself. Again, he could not give evidence that the sole property was in another, by whose directions he did the act complained of, for that also is inconsistent with his admission that the plaintiff had some property; but there is no reason why he should not be allowed to prove that another has the *same* interest as the plaintiff, and that he lawfully acted by the authority of that other; or

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to make any other defence to the action which is not inconsistent with the admitted fact, that the plaintiff has some property in the goods as between him and the defendant. For these reasons we think that the defendant's admission of the plaintiff's property did not preclude him from the defence which he proposed to make.

The next question is that which was discussed on the second argument, whether it was competent for him to do so, under the plea, which is in effect a plea of not guilty of the conversion alleged. By the new rules the plea of not guilty, in actions on the case, operates as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant; and under the head of examples is given the action of trover, in which it is said to operate as a denial of the *conversion* only. Does this mean a denial of the fact of the conversion of the property to the defendant's use only; or a denial of the *wrongful* conversion, and also that such conversion was tortious?

A reference to the context enables us to discover the meaning of this term. It is intended to confine the operation of the plea to a denial of the fact of conversion only, and not to allow the defendant to give evidence of its legality, any more than in a plea of not guilty in an action on the case for obstructing a right of way, the defendant could be allowed to show that the obstruction was lawful, or under a like plea for diverting a watercourse, to give evidence that such diversion was justifiable by licence or prescription. The latter point was decided in the case of *Frankum* v. *The Earl of Falmouth* (*a*) in last *Hilary* term; and the effect of the new rules is therefore to alter the previous operation of the plea of not guilty, not merely by pre-

(*a*) 2 Adol. & Ell. 452.

venting it from involving a denial of the inducement as it did before, but also by confining it to simple denial of the breach, and by excluding all matters in confession or avoidance.

In all cases, therefore, where there has been a conversion of the property in question by the defendant, and the defendant insists that such conversion was lawful, he ought, since the new rules, to confess it, and avoid by pleading specially the right or title by which he converted it; as, for instance, the leave and licence of the plaintiff; or, as in the present case, the authority given by law to one part owner or tenant in common to take possession of the joint property, or to one partner to sell it.

But a question still remains as to the meaning of the term "conversion;" no doubt however occurs in this case, as the seizure of the chattel by the defendant, or its subsequent sale, is undoubtedly a conversion by the defendant, and he must therefore confess and avoid that conversion, by pleading specially the title by which he did it. A doubt may, however, present itself as to the proper course to be pursued where the defendant has a lien on the goods, and there has been only a refusal to deliver on demand by the plaintiff; which demand and refusal, it is well established, is not a conversion of itself, but only evidence of it, and may therefore be explained. The court are not under the necessity of pronouncing any judgment upon this question at present, but nothing that has been said is to be taken to be an intimation of an opinion, that in such a case, where there has been a refusal to deliver on the ground of lien, the right of lien need be specially pleaded.

Rule discharged.

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SHARMAN *against* STEVENSON.

Indebitatus assumpsit for 100*l.* had and received, and for 100*l.* on an account stated. Pleas: "as to 25*l.*, parcel of the monies mentioned in the declaration, that the plaintiff ought not further to maintain his action, because the defendant brings into court here the said sum of 25*l.* ready to be paid to the plaintiff: and further saith, that the plaintiff has not sustained damage to a greater amount than 25*l.* in respect of the causes of action in the declaration mentioned, *as to the sum of* 25*l.*: concluding with a verification, but without the prayer of judgment as to the further maintenance of the action. Non assumpsit to the rest of the pleas. Special demurrer to the first plea: Held, that it was bad, for not concluding with such prayer of judgment in the form provided by the general rules of pleading, *Hil.* 4 *W.* 4. s. 17.

Where a plea of payment of money into court is pleaded with other pleas, should be pleaded last, and to the residue of the causes of action not before answered.

ASSUMPSIT for 100*l.*, money had and received and for 100*l.* found to be due on an account stated. Pleas: as to the sum of 25*l.*, parcel of the monies the declaration mentioned, defendant saith that the plaintiff ought not further to maintain his action, because the defendant brings into court here the said sum of 25*l.* ready to be paid to the plaintiff: and the defendant further saith, that the plaintiff has not sustained damage to a greater amount than 25*l.* in respect of the causes of action in the said declaration mentioned *as to the sum of* 25*l.*, and this the defendant is ready to verify. As to the residue of the monies in the said declaration mentioned, non assumpsit. Special demurrer to the first plea, stating for causes that the said plea is not in the form, nor as near as might have been in the form required by the 17th rule (*a*), relating to the mode of pleading in the superior courts of common law at *Westminster*, made by the judges of the said courts, in pursuance of a statute passed in the third and fourth years of the reign of our sovereign lord the now king (*b*). Joinder in demurrer.

Waddington in support of the demurrer. The

(*a*) *Reg. Gen. Hil.* 4 *W.* 4. No. 17; *ante*, Vol. IV. at end of Vol.

(*b*) 3 & 4 *W.* 4. c. 42. s. 1.

plea does not in form or substance resemble the form prescribed by the rule (*a*). It is no answer to a cause of action stated to amount to 100*l.* that as to 25*l.*, parcel of that sum, the plaintiff has not sustained greater damages in respect of the causes of action mentioned in the declaration, "as to that sum." The plea seeks to put in issue a cause of action for 25*l.*, and a claim of damages above that sum for breach of promise respecting it. Now that is not the averment in this declaration; it is a common indebitatus assumpsit for 100*l.* had and received, and 100*l.* for money due on an account stated; and does not seek to recover larger damages than the 100*l.* laid in the breach, or aver that the plaintiff has sustained them. It is calculated to mislead him, for he must have replied that he sustained damage beyond 25*l.* in respect of the sum of 25*l.* in the plea mentioned. As to the residue, he pleads non assumpsit, thus splitting into two what should be one issue. As this plea concludes without a prayer of judgment, it is contrary to the form in the rule; and must therefore be taken as pleaded in bar of the whole action under the same general rule. If so, the plaintiff could not safely take the 25*l.* out of court and tax his costs; nor could he reply in the form suggested by s. 19. All the plea can mean is, that we have sustained 25*l.* damages only.

Humfrey in support of the plea. The particular form of the plea of payment provided by the new rule is not strictly applicable to this action, which, from the

(*a*) Being "That the plaintiff ought not further to maintain his action, because the defendant now brings into court the sum of £——, ready to be paid to the plaintiff: and defendant says, that the plaintiff has not sustained damage [or, in actions of *debt*, that he is not indebted to the plaintiff] to a greater amount than the said sum &c. in respect of the cause of action in the said declaration mentioned, and this he is ready to verify: wherefore he prays judgment if the plaintiff ought further to maintain his action."

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particulars of demand, appears to be brought to reco either a bet of 100*l.* demanded as won, or, if not, t 25*l.*, the stake deposited with the defendant. [*Parke* How could the plaintiff recover on a wager in an act for money had and received? If he could not, defendant has paid into court all that he could reco Then why not have pleaded payment into court ge rally, according to the form prescribed by the r rules? What difficulty was there in pleading in t case? If the particulars show several demands, i easy to plead as to one, non assumpsit, as to anot accord and satisfaction, set-off, or payment before tion brought, and as to the rest, payment of money i court.] This plea substantially does so, by plead payment of money into court, and non assumpsit to residue.

Lord ABINGER C. B.—The plea is bad. The p ment into court of 25*l.* is made in respect of all causes of action.

PARKE B.—The only proper plea in this case that of payment of money into court. This ple clearly bad for want of a prayer of judgment, if plaintiff should further maintain his action. T would deprive the plaintiff of his opportunity to t the money out of court, and occasion him the los his costs against the defendant. Any defence a part of the causes of action should have been plea first; and a plea of payment of money into court a the residue should have followed. If the plaintiff more into his declaration than he ought, he w have to pay costs.

ALDERSON B.—Non assumpsit, if pleaded at should have been pleaded to a specific part, and ment into court should then have been pleaded to

residue. That plea must always be as to the residue after exhausting defences to the other matters by appropriate pleas.

The *Court*, however, permitted an amendment, on the defendant's undertaking to plead in the form prescribed by the rule, and on payment of costs.

Rule accordingly.

LACEY *against* FORRESTER.

ASSUMPSIT on a promissory note. Plea, that no consideration was given for it. Replication, that there was, and issue joined. At the trial before one of the secondaries of *London* under writ of trial, the plaintiff gave no evidence of consideration, but had a verdict.

Kelly moved for a new trial. The defendant was entitled to the verdict, for the plaintiff did not prove that consideration was given for the bill, though the onus of proving that fact affirmatively was thrown on him by the replication.

ALDERSON B.—The new rules of pleading in assumpsit (*a*) expressly provide that in assumpsit "all matters in confession and avoidance shall be specially pleaded; *ex. gr.* illegality of consideration, drawing,

The new rule on pleading in assumpsit, *Hil.* 4 *W.* 4. I. s. 3. [*ante*, Vol. IV. xv.] provides that matters in confession and avoidance, *ex. gr.* illegality of consideration, drawing, indorsing, or accepting bills or notes by way of accommodation, shall be specially pleaded: Held, in an action on a promissory note, that a plea that "no consideration was given" for it, throws on the defendant the onus of affirmative proof that the note was without consideration, notwithstanding the plaintiff was obliged by the plea to allege the affirmative in his replication.

(*a*) *Hil.* 4 *W.* 4. Pleadings in particular Actions, I.; Assumpsit, s. 3; *ante*, Vol. IV. p. xv.

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indorsing or accepting &c. bills or notes by way of accommodation, &c." The onus lay on the defendant to show that there was no consideration for the note; for as the plea should have stated that the note was given by way of accommodation &c., in which case it would have been imperative on him to prove the affirmative, he ought not to be suffered to place himself in a better situation by avoiding that statement.

Lord ABINGER C. B., BOLLAND and GURNEY Bs. concurred.

Rule refused (*a*).

(*a*) And see per *Parke* B., *ante*, Vol. IV. 472, *Easton* v. *Pratchett*; and 1 Stark. on Ev. 2d edit. 363.

STOUGHTON *against* The Earl of KILMOREY.

In assumpsit by the payee of a promissory note against the maker, a plea that it was made by the defendant "*without* any value or consideration whatever for his so doing, or for his paying the amount thereof, or any part thereof," was held bad on special demurrer, for not stating in the affirmative the facts which showed the consideration.

The court only allowed an amendment on the terms of filing an affidavit truth of the matters pleaded.

ASSUMPSIT by the executor of *Anthony Stoug* against the maker of a promissory note, dated *May* 1822, for 889*l.* 10*s.* with lawful interest, and payable at sight to the deceased. Plea: that the fendant made the said promissory note without value or consideration whatever for his so doing, or his paying the amount thereof, or any part the Verification. Demurrer, assigning for special ca that it was not averred, nor did it appear in and by plea, how or under what circumstances, or for purpose, the note was made, and also that the ought to have stated and shown affirmatively how

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was no consideration or value for the said earl's making the said note: and also for that the said plea is too general: and also, for that as the note must be taken and presumed in law to have been made for value and consideration, and as no fresh facts were stated in the plea, the plea should have concluded to the country. Joinder. On the margin of the demurrer-book it was stated that the grounds of demurrer were, that the plea ought to have set forth the special facts under which the note was given, so as to have shown that there was no value or consideration for it, and also other the grounds set out in the demurrer: also that the plaintiff would object that the plea was bad, not only for alleging that there was no consideration or value for making the note, but also that there was none for paying it.

Chandless in support of the demurrer. It may be argued on the general demurrer, that though no consideration existed when the note was made, yet afterwards, on its delivery to the plaintiff, there might. That state of facts is not met by this plea. As it does not aver that the defendant never had any consideration, it is not a complete answer to the declaration. [Lord *Abinger* C. B. In *Easton* v. *Pratchett* (*a*) we intimated that this plea would be bad on special demurrer.]

Wightman was then called on to support the plea. Assuming for argument's sake that this note was made absolutely without consideration, it is a good defence to the action, and might, therefore, be pleaded. Had issue been taken on this plea, the defendant must have begun, and must have proved negatively that there was no such consideration (*b*); so that the plaintiff might

(*a*) *Ante*, Vol. IV. 472 *m*. (*b*) See *Lacey* v. *Forrester*, last case.

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have replied generally. Again, had the plaintiff replied, taking issue on this plea, the onus of proving consideration would not have been on him, but on the defendant, who must have begun by disproving it (a). For the plaintiff might have replied generally that there was a fair and bonâ fide consideration; *Bramah* v. *Roberts* (b).

Lord ABINGER C. B.—This is a plea in the negative; whereas the object of the new rule of pleading in assumpsit [*Hil.* 4 *W.* 4. No. 1.] was to make each side understand what they were to come to try. There are every matter, independent of the making the promise, that should be affirmatively stated (c); for as a gift or larceny of the bill, and many other circumstances, might disprove the consideration, it would follow that unless they were stated in the plea, the plaintiff might be surprised at the trial by evidence of some sort of want of consideration.

PARKE B.—The words of *Reg. Gen. Hil.* 4 *W.* 4. No. I. Assumpsit s. 3., that the drawing, indorsing, or accepting &c. bills or notes by way of "accommodation" must be specially pleaded, were inserted advisedly.

The *Court*, on the ground that a promissory note imported a consideration, refused to allow an amendment, unless on filing an affidavit of the truth of the matters pleaded. Those terms were accepted for the defendant, and the amendment was

Allowed accordingly.

(a) See *Lacey* v. *Forrester*, last case; and *Percival* v. *Frampton*, *post*, 5 79.
(b) 1 Bing. N. C. 469. (c) See 4 Tyr. 472, n., *Easton* v. *Pratchett*.

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ASSUMPSIT against the drawer of a check drawn on a banker for 39*l.* 18*s.*, payable to the plaintiff or bearer, with a count on an account stated. Plea to the first count, that there was not at any time any consideration or value for his (the defendant's) making the said draft or order, or for paying the amount thereof; and *non assumpsit* to the last count. Replication to the first plea, that at the time of making the draft or order there was a good, valid, and sufficient consideration for his (the defendant's) making the same. Similiter to the last plea. At the sittings for *London*, held after last *Michaelmas* term, *Parke* B., after argument, directed the defendant's counsel to begin, on the ground that as the check was admitted by the plaintiff, and imported consideration, the onus of disproving consideration lay on him. It appeared that the check in question was given by the defendant to the plaintiff, an auctioneer, as the deposit on the purchase by auction of a leasehold house and premises, sold to the defendant. The defendant afterwards stopped the check at his bankers, and resisted payment on the ground that the plaintiff had wilfully misdescribed the premises as being held liable to a ground rent, whereas they were in fact liable to a larger rent to an equitable mortgagee. The learned baron inclined to think

The defendant bought premises at an auction, and gave the plaintiff, who was an auctioneer, a draft on his banker, instead of money, in payment of the deposit. Having afterwards refused to pay the draft on account of misdescription of the property by the plaintiff, he pleaded to an action on the draft by *B.* that "there was not, at any time, any consideration or value for his making the draft, or for paying its amount." Issue having been taken, the jury found the plaintiff guilty of a wilful misrepresentation in the description of the premises.

Held, 1st, that the draft having been in point of law given without consideration, the defendant could have rescinded the contract; and might therefore resist payment of his draft, on the ground that the contract, which was the consideration, having been done away ab initio, no consideration remained at all, and, therefore, that *after verdict* the plea must be taken to have been proved; 2dly, that the plea would have been bad on special demurrer, for not containing an affirmative allegation pursuant to the new rule of pleading, Hil. 4 *W.* 4. No. I, *Assumpsit*, s. 3.

Whether this was a transaction "void or voidable in point of law on the ground of fraud," within that rule, and therefore to be specially pleaded, *quære.*

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the defence sufficient had it been duly pleaded, I doubting whether, as there was a clear considerat for the check at the time it was given, though it aft wards failed, the above facts could be given in evide on the special plea of no consideration, he asked jury whether they found misrepresentation by the fendant, and if they did, whether it was wilful or er neous only; which latter case was provided for by a ther condition of sale, which found it a wilful m representation. The learned judge directed the fa to be taken as found and stated specially on the reco in order that if the court should think the plea proved, they might give judgment according to the just of the case, under 3 & 4 *W.* 4. c. 42. s. 24. Verdict the plaintiff for the amount of the check, with leave move to enter a verdict for the defendant on the spec plea. A rule was obtained by *Chandless* according in *Hilary* term, also calling on the plaintiff to sh cause why the plea should not be amended under 3 & *W.* 4. c. 42. s. 23., or on payment of costs. He c tended that the sale was void for wilful misrepre tation.

Erle and *Rawlinson* showed cause in that term. auctioneer suffered the defendant to stand as purc of the premises on giving this check, instead actual payment of money. But on this plea the tiff is entitled to retain his verdict, which is mere there was no consideration; for the plaintiff that there was a sufficient consideration in the the premises, nor is there any special plea co the consideration, and avoiding it for illegality o in the manner directed by *Reg. Gen. Hil.* Assumpsit, s. 3. [*Ante*, Vol. IV. p. xv.] The having no notice of that defence, was prepare prove that there was a consideration for t

given by the defendant. The defence set up at the trial was, not that there was no consideration, but that it had failed on the ground of fraud. It is now sought to amend the plea, supposing this defence not to be available under its present terms. But the widest amendment authorized by 3 & 4 *W.* 4. c. 42. s. 23. is in "a matter not material to the merits of the case, and by which the opposite party cannot have been prejudiced in the conduct of his action." Now the amendment proposed would change a plea that there was no consideration, into a plea that there was a consideration, but void for fraud. That is a material matter, which would wholly change the nature of the case, with which the plaintiff should have been prepared. It is therefore a variance not "immaterial to the merits of the case" within s. 24., which authorizes the court to give judgment "according to the very right and justice" of it. [*Parke* B. The new rules on the subject of pleading want of consideration in actions on bills and notes, have not been rightly understood; and the form of pleading now before us, which has become so common, is founded on that mistake. Those rules intended that defendants should plead affirmatively matter to show either total want of consideration at any time, or its partial failure after having once existed, as well as the circumstances under which the bill or note was given. This plea then should have been so framed as to state affirmatively the facts showing that there had been a contract of sale, and a wilful misrepresentation by the plaintiff of the property to be so sold. The judges who framed the rules never contemplated these general pleas of no consideration for a bill or note.] The defence may be simply the absence of all consideration. [*Parke* B. Still all facts respecting the accommodation of the party should have been pleaded. This is a legal fraud on the part of the plaintiff himself.

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Had the defendant actually paid the money, he might have recovered it back. Then as he had a right to rescind the whole contract at any time, he had a defence to the check which was given and accepted in lieu of money, the only question being, whether such defence was open to him on this plea (*a*).] *Collett* v. *Thompson* (*b*) and *Todd* v. *Hogg* (*c*) were mentioned.

Thesiger and *Chandless* contrà, supported the plea. The question as to the validity of the plea is, not whether there was a total or partial failure of consideration, (of which the former only would afford a complete defence, *Stephens* v. *Wilkinson* (*d*),) but whether the jury having found wilful misrepresentation, that the defendant might have rescinded the contract at any time as for want of original consideration, and recovered his deposit, had it been made in money, in an action for money had and received, he might not defend this action on his check on a like ground, under the plea of no consideration. As fraud must have existed at the time of the contract itself, it so entirely vitiated it that in point of law no consideration ever existed. That defence might have been given in evidence on this plea before the new rules, for the legal effect of the circumstances constituting the defence was all that need have been pleaded. [*Parke* B. There is no instance of such a plea before the new rules.] Section 3. [*ante*, Vol. IV. p. xv.] by directing, that in every species of assumpsit, all matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be

(*a*) See *Lewis* v. *Cosgrave*, 2 Taunt. 2. (*b*) 3 B. & P. 246.

(*c*) M. & M. 128.

(*d*) 2 B. & Adol. 325. See Bayley on Bills, 394, 4th edit.; *Day* v. [illegible] 9 B. Moore, 159.

either void or voidable in point of law, on the ground of fraud or otherwise, shall be "*specially pleaded*," only requires a setting forth the party's defence specially instead of pleading the general issue. The object was to fix on the record before trial the points in dispute, and to abolish the practice of giving special matters in evidence by surprise on the general issue, but not to introduce any fresh principles, methods, or forms of "specially pleading." Then has not the defence in this case been sufficiently put on the record? for it was always sufficient to state the circumstances which composed a defence according to their legal effect, without more fully detailing them; *Butler* and *Baker*'s case (*a*). *Hodgson* v. *Gascoigne* (*b*), *Hull* v. *Pickersgill* (*c*). [*Parke* B. The two latter cases are exact illustrations of the maxim "Omnis ratihabitio retrotrahitur et mandato priori æquiparatur."] A justification of a libel charging the plaintiff with stealing certain articles, need only state that the plaintiff did steal them, without stating the circumstances of the taking &c. Payment may be pleaded generally, without stating whether it was to the plaintiff, or a banker's clerk. Again, in declaring on a deed it is sufficient to state its substance and legal effect, without using its very words. So, in indictments, it is sufficient to state the legal conclusion from the facts to be adduced in evidence, viz. that the party feloniously took goods, embezzled money, &c. Had this defendant relied on fraud as an answer to this action, the plea must have specially stated it; but he relies on his right to rescind and avoid the contract ab initio for want of consideration. That is as much a

(*a*) 3 Rep. 27, *b*. See Stephen on Pleading. 3d ed. ch. 2. s. 5. Rule 5. p. 389; *Moore* v. *Lord Plymouth*, 3 B. & Ald. 66; *Pike* v. *Eyre and others*, 9 B. & Cr. 909.

(*b*) 5 B. & Ald. 88.

(*c*) 1 Br. & B. 282; and see 3 Bing. 605; 10 B. & Cr. 157, 298.

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matter of defence to the check on this plea, as it have been a ground for the plaintiff to recov deposit, had it been made in money, as for sc money had and received by the defendant to his ı a total failure of consideration. [*Parke* B. Y that you may give the facts in evidence, whetl the ground of the plaintiff's right to rescind th tract ab initio, either for fraud, or for breach o tract by the plaintiff, in not being able to establi title he professed to do.] At all events, the pl be suffered to be amended under 3 & 4 *W.* 4. s. 23.; for the plaintiff came to trial to stand on objection, and drive the defendant to a cross under *Moggridge* v. *Jones* (*a*). [*Parke* B. Thi is of very great importance, and has been ver argued on both sides. It is requisite that th struction of these rules should be deliberately se

Cur. adv.

In this term PARKE B. delivered the judgn the court (*b*).—This was an action against the d ant as drawer of a check for 39*l.* 18*s.* on the b *England.* The plea was, that there was no deration or value for the drawing of the said The replication stated that there was good deration.

On the trial before me at *Guildhall,* it appear the check was given by the defendant for the pa of a deposit, on a sale by auction of certain les property by the plaintiff, as auctioneer to the d ant, which property was misdescribed in the part of sale by which the defendant bought. Th

(*a*) 14 East, 486; 3 Camp. 38. *S. C.*

(*b*) This judgment was delivered several days after *Lacey* v. had been disposed of.

ditions contained a clause, that no error or misstatement should vitiate the sale; but the jury found that the misdescription was wilful, and therefore, that the defendant had a right to repudiate the contract altogether, which he did; and having given orders to the bank to dishonour his check, it was refused payment. It appeared to me on the trial, that the plea was not framed as it ought to have been to meet the case, and I ordered a verdict for the plaintiff, reserving to the defendant liberty to move to enter a verdict for him; and, in the event of the court being of opinion that the plea was not proved, the facts were to be considered as found specially, pursuant to the 3 & 4 *W.* 4. c. 42. s. 4. A rule nisi having been obtained, cause was shown last term, and the court took time to consider their judgment.

It was argued by the learned counsel for the defendant, first, that by the old law all facts must be pleaded according to their legal operation; and that the legal operation of the circumstances in evidence in this case is properly stated on the plea; and, secondly, that the new rules have not made any difference in the principles and rules of pleading, except in those instances for which they have specially provided; and that either they have not provided any other mode of pleading in this case, or, if they have, the objection should have been taken on demurrer, and cannot now be available; and, upon consideration, we think the argument well founded.

That all facts are to be pleaded according to their legal operation is clear; and the case cited on argument in *Butler* and *Baker's* case, 3 *Coke*, 28 *a.*, is a striking instance of the application of that rule, and affords a close analogy to the present. It is there said, that if lands are given to a husband and wife, and the heirs of the husband, or their heirs, and afterwards

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the husband dies, the wife may waive the joint estate, and bring her writ of dower, and the husband shall be said in pleading to be sole seised ab initio; and the refusal shall have such relation in judgment of law, that the husband was sole seised ab initio.

In the present case the check was given in lieu of money, as a deposit on a sale; the consideration for giving it by the defendant, was the plaintiff's contract to sell leasehold property of a certain description, which property in fact he had not to sell; and therefore the defendant had a right to rescind the contract, and would have been entitled to recover back the deposit, if it had been paid in cash. Of course, therefore, he may resist the payment of his check; and that on the ground that the contract, which was the consideration, having been done away with ab initio, no consideration in judgment of law existed at all.

But then it may be said, that as the defendant would have been bound by his contract, if there had been any unintentional error or misstatement, and could only rescind it on the ground that the misstatement was wilful, and therefore of necessity fraudulent, the true nature of the defence was, that the transaction was void on the ground of fraud, and therefore by Article 1. of Rule 3. of Pleadings in Assumpsit, should have been specially pleaded. If, however, this be such a case of fraud as falls within the rule, and we doubt if it be so, the question is, whether the plaintiff can take advantage of the non-compliance with the rule in this stage, and we think he cannot. The note has been, in point of law, given without consideration, although the plaintiff's fraud has enabled the defendant so to treat it. The plea is therefore proved by the evidence, and that is the only point now to be decided.

The plea would no doubt have been bad on special demurrer; for before the new rules, it would have

amounted to the general issue, as being in truth no more than a denial of the implied allegation of consideration involved in that of drawing the check; and it was not authorized by the new rules because they require some affirmative allegation; and the reason for so framing them was purposely to avoid any question as to the burthen of the issue on such a plea. In the recent case of *Easton* v. *Pratchett* the court intimated that a similar plea was good after verdict, though bad in demurrer; and still more recently, in the case of *Stoughton* v. *Earl of Kilmorey* [*ante*, p. 570], the court decided such a plea to be bad on special demurrer. We are, therefore, of opinion that the rule must be made absolute to enter a verdict for the defendant.

Rule absolute.

PERCIVAL and Others *against* FRAMPTON.

In an action on a promissory note for 500*l.* by indorsees against indorser, the plea was, that except as to 200*l.* one *A.* made and delivered the note to defendant for indorsement by him for the accommodation of *A.* and to enable him to obtain advances of money thereon, and without any other purpose or consideration, and that it was indorsed by the defendant to enable *A.* to obtain advances from the plaintiffs, but that they advanced only 200*l.*, and that there was no consideration for the residue of the note. Replication, that the plaintiffs were holders of the note for valuable consideration given by them to *A.* in respect of their being holders of such note, to its full amount. *A.* was a customer of the plaintiffs, who were bankers, and owed them above 500*l.* at the time that the note indorsed by defendant was deposited with them. They examined the account, entered it in their books as discounted for *A.*, charging him with the discount, and advanced him 198*l.* upon the credit of it. Held, first, that upon this issue the defendant was bound to begin by impugning the plaintiffs' title to the note; secondly, that the discounting the note for *A.* by the plaintiffs, after inspecting his account, was equivalent to their advancing him the whole amount of it; thirdly, that if the note was given to the plaintiffs, and received by them in part payment of or as a security for a previous debt due from *A.*, or if they gave credit to him on the faith of *A.* they were properly stated to be holders for valuable consideration.

ASSUMPSIT on a promissory note dated 1st *November* 1834, made by *R. S. Atcheson* for 500*l.* payable to the defendant's order, and by him indorsed to the plaintiffs. Plea to the whole declaration, ex-

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cept the sum of 200*l.*, that *R. S. Atcheson* made a delivered the note to the defendant for the purpose being indorsed by him for the use and accommodati of the said *R. S. Atcheson*, and to enable him to obta advances of money thereon, and without any oth purpose or consideration; and that the note was i dorsed by the defendant to enable the said *R. S. Atch son* to obtain advances from the plaintiffs, but that t plaintiffs had advanced only the sum of 200*l.*, "a that there was no consideration for the residue of t note." Replication, that the plaintiffs were and st are the holders of the said note for good and valuab consideration given by them the said plaintiffs to t said *R. S. Atcheson*, in respect of their being t holders of such note, to the full amount thereof. A the trial at *Guildhall* at the sittings after last *Hilar* term, it was contended for the defendant, that upc these pleadings, the plaintiffs were bound to begin b proving the consideration they had given for the not *Gurney* B. was of a different opinion. However, t plaintiffs, who were bankers, waived the advantag and called their clerk, who proved that *Atcheson* ha an account with them, and that, after inspecting it, t note in question was placed to his credit by the plai tiffs as a note discounted for him, the discount bei entered on the debit side as deducted by them. the time this was done, he owed the plaintiffs a balar of more than the 500*l.*; and they only advanced h 198*l.* subsequently. For the defendant it was co tended, that this proof did not establish the "cor deration" intended by the pleadings; the note bei given not to pay a prior debt owing to the plaintiffs *Atcheson*, but to secure further advances by them him. The learned baron dissented. Verdict for t plaintiff for 506*l.* damages.

J. *Henderson* moved for a new trial. The replication admits that there was no consideration between the original parties, *Atcheson* and the defendant, or between the latter and the plaintiffs. Then the plaintiffs having, as indorsees, no privity with the maker of the note, were bound to prove affirmatively that they gave him consideration to the amount of 500*l.* "for and in respect of their being holders of the note," but they failed to do so, and only proved an advance of 198*l.* on that account. Now the "consideration" necessary to be proved in support of this issue was confined to advances made by the plaintiffs to *Atcheson* subsequently to the deposit of the note, and a note indorsed to them to secure such advances could not be applied to cover a previous debt to them from him. As there was no consideration between the original parties to the note, the holders could not enforce it against the defendant, who is admitted to be an accommodation indorser, except for the 198*l.* actually paid on the faith of his indorsement. The advance of the rest should have been actual, in order to their recovering the whole amount of the note.

PARKE B.—I think that no rule should be granted. As to the first point taken at the trial, I am of opinion that the learned judge was quite right in deciding that the onus did not lay on the plaintiffs to prove the consideration given for the note in the first instance. The simple fact admitted on the pleadings is, that the indorsement was for the maker's accommodation, but no inference arises that the holders of the note were not holders for value. On the contrary, the fact of their holding it, joined with the indorsement on it, raises the presumption that they gave value for it, that being the very object for which it was made. Had been alleged that it had been stolen or obtained by

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fraud &c., the inference might arise that the hold had not given full consideration for it, as the pers who had improperly obtained it would be likely to p it away at an under value. The defendant then ou to have begun by producing evidence to impugn t plaintiffs' title to the note. In point of fact, howev the plaintiffs called their clerk to prove the considerati they had given for the note, and it appeared that th discounted the note for *Atcheson*, after inspecting t state of his account with them. That is equivalent their having advanced him the amount of the no Ascribing then to the averment in the replication t most limited construction, it is proved in fact, for it a pears that the note was discounted. But if the d counting had not been so proved, the replication wou have been good, for if the note had been given to t plaintiffs, and received by them in part payment of antecedent debt, or as security for it, they might w be stated to hold it for valuable consideration. I thi the same might be averred of them as mere holders the note, if they gave credit to *Atcheson* on the fa of it.

ALDERSON B.—I entirely agree. The mere fact h admitted on the pleadings, that this was a note dorsed for the accommodation of the maker, raises inference that the holders were not holders for val The only object of handing over an accommodation or note is, that the drawer or maker shall obtain va for it.

BOLLAND and GURNEY Bs. concurring,

Rule refused (*a*)

(*a*) This case was afterwards cited and relied on by *Parke* B. in *H* term 1836. See 1 Tyr. & Gr. Rep., Part 2.

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ROBERTS *against* WILLIAMS and Another.

In actions against justices the "place of abode" of the plaintiff's attorney required by 24 *G.* 2. c. 44. s. 1., to be indorsed on the notice of action, is sufficiently described by stating his place of business, though he in fact sleeps and resides elsewhere.

THE defendants, two justices of *Denbighshire,* were sued for imprisoning the plaintiff without reasonable or probable cause. At the trial before *Bolland* B. at the last *Lent* assizes for *Cheshire,* the notice of action served on defendants was produced, bearing the following indorsement:—"*Ed. Jones, Record Street, Ruthin, Denbighshire,* attorney for the said *Robert Roberts.*" Mr. *E. Jones* had his office for business in *Record Street* in *Ruthin,* as defendants heard, but his residence was at a spot in another parish, and a quarter of a mile out of the town of *Ruthin,* though said to be within that borough. The plaintiff had a verdict; the learned baron giving the defendants leave to move to set it aside, on the ground that the notice was not a sufficient description of the attorney's place of abode within 24 *Geo.* 2. c. 44. s. 1.; *Taylor* v. *Fenwick* (*a*).

J. Jervis for the defendants, moved accordingly in this term to enter a nonsuit. He also stated that the attorney by whom the declaration was delivered was *John Williams,* not *Edw. Jones.* [Lord *Abinger* C.B. The plaintiff might have changed his attorney since the notice was served.] A rule having been granted,

R. V. Richards and *Dunn* showed cause in *Trinity* term. The object of the enactment of 24 *Geo.* 2. c. 44. requiring the place of abode of the plaintiff's attorney to be stated, was to enable justices to find out the attorney who sued out the process in order to tender amends (*b*). For that purpose, "place of abode" must mean place of business, where the attorney is most

(*a*) 3 Bos. & P. 553 n.

(*b*) See *Cook* v. *Curry,* cited 3 Burn's Justice, 26th edit. 494. And per *Bolland* B. 1 Tyr. R. 490. *Smith* v. *Brown.*

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readily to be found in business hours. Suppose attorney to sleep nightly in one of the suburban lages, as *Hampstead*, and to go to his office in *Lon* daily, should the notice be dated from *Hampstead* or from his office? In the common case of a firm consisting of several, who all attend one office, but sleep at different places widely apart, is the notice to be dated from each of the latter? [*Parke* B. That would give the defendant a facility in tendering amends to either of them.] It would also assist the plaintiff in the object generally kept in view, that of avoiding a tender. A firm of attornies may sign the bill within 2 *Geo.* 2. c. 23. s. 23. without adding their christian names. *Smith and Another* v. *Brown* (*a*), and *James* v. *Swift* (*b*) show that a notice of this description given by a firm of attornies was good, if signed by the initials only of their christian names. [*Parke* B. The question there was, whether what was signed did not satisfy the word "name" in the statute; christian and surname not being mentioned in it.] For the objects of this act, the "place of abode" of an attorney means the place where he abides as such during the day to perform business, and may be found in business hours. Had this notice described the attorney as "of *Ruthi*", it would have been a sufficient description of his abode for in *Osborn* v. *Gough* (*c*) a notice signed "*Willi* *Spurrier* of *Birmingham*" was held sufficient. The "*Record Street*" was only surplusage. [Lord *Abin* C. B. The question there raised was, whether any difficulty was thrown on the magistrate by the absence a more specific description of the attorney's residence and it was held in the negative, as nothing showed that on a reasonable diligence of inquiry he might not have

(*a*) *Ante*, Vol. I. 486.

(*b*) 4 B. & Cr. 681; and see *Mayhew* v. *Locke*, 7 Taunt. 63; 2 Marsh. 377. *S. C.*

(*c*) 3 Bos. & P. 551.

been found.] The notice in *Taylor* v. *Fenwick* (a) was very different; being "given under my hand at *Durham*," which the party might be passing through on a journey, and giving no information of his place of residence. By *2 Will.* 4. c. 39. s. 12. every writ is to be indorsed with "the name and place of *abode*" of the attorney issuing it, or, where no attorney is employed, then with a memorandum expressing it to be sued out by the plaintiff in person, and describing his residence. This distinction between the "abode" of the attorney and the "residence" of the plaintiff has been recognized by *Patteson* J. in *Engleheart* v. *Eyre* (b), and by this court in *King* v. *Monkhouse* (c).

J. Jervis in support of the rule. The safest course is to follow the plain words of the act. In *Taylor* v. *Fenwick* Lord *Mansfield*'s expressions were these:—"The truth of it is this; in favour of justices the legislature has thought fit to prescribe a precise form, whether right or not, it does not matter; the attorney must tell the defendant in words his place of abode." That decision is reported in the notes to *Osborn* v. *Gough*, and its principle was followed up by the court of Common Pleas in their observations in the latter case. *Hill* v. *Humphreys* (d) was decided on *2 Geo. 2.* c. 23. s. 23., which requires the delivery of an attorney's bill at the client's "place of abode." It is a strictly analogous case. Lord *Kenyon* held, that leaving it at his counting-house was not sufficient, though it was the place of his business, and where he must be taken

(a) 3 B. & P. 552, *notis.* (b) 2 Dowl. P. C. 145.

(c) *Ante*, Vol. IV. 234. See also *Lewis* v. *Newton*, 1 Tyr. & Gr. 72; *Parkes* v. *Collis*, 3 Dowl. P. C. 429; *Yardley* v. *Jones*, 4 id. 45. *Semble*, in these cases it did not appear that the party had any other place of abode.

(d) 3 Esp. C. N. P. 224.

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to have usually made his payments. [Lord *Abin*
C. B. As the same words occur in many other statu
and the point is of considerable importance in pract
we will take time to consider it.]

Cur. adv. vult.

In *Michaelmas* term 1835 (*a*) the judgment of t
court was delivered by

Lord ABINGER C. B.—The question for our con
deration in this case is, whether, in an action agains
magistrate for an act done by him in the execution
his office, the requisite notice of action was sufficien
indorsed with the "place of abode" of the plaintif
attorney? That indorsement, in point of fact, se
forth his place of business in a particular street
the town of *Ruthin*, and not his dwelling-house, whi
was not situate in that street, but at some little distan
out of the town. We have not found any expr
decision on the point; but upon similar words in oth
acts of parliament, a practice has prevailed of dati
process &c. from the place of business of the att
nies. That course has been confirmed by several d
cisions. As the evident reason and convenience
the thing is thus supported by the practice in analog
cases, it seems reasonable to decide that the pl
where an attorney abides for the purposes of his bu
ness is his "place of abode" within the scope of t
act, and consequently that this notice was sufficie
We agree with the argument for the plaintiff, that v
great inconvenience would arise, if a notice must st
all the various residences of the several partners in
firm which may be concerned for a plaintiff. Defen
ants might thus be compelled to visit different places t
tender amends, while either of the parties sought fo

(*a*) See p. 526, note (*a*).

might most easily and frequently be found at the place of business common to the whole firm. We have come to this conclusion, after some doubt and much consideration. We are disposed to think that it would suffice to state on the notice either the actual residence of the attorney or his place of business.

Rule discharged.

KING and Others, Executors of KING deceased, *against* MATTHEW SEARS.

ASSUMPSIT. The first count of the declaration stated, that the defendant, before and at the time of the promise and undertaking thereinafter next mentioned, was the administrator of the goods, chattels, and effects of *William Sears* deceased, who heretofore, to wit, on 10th *August* 1833, died intestate: that the said *W. Sears* in his lifetime, and at the time of his death, was indebted to plaintiffs, as executrix and executors as aforesaid, in a certain sum of money, to wit, the sum of 13*l.*, being rent due and in arrear for the use and occupation of certain premises of the plaintiffs, as executrix and executors as aforesaid, before then used and occupied by the said *W. Sears*, by the sufferance and permission of the plaintiffs as executrix and executors as aforesaid, and at his request, under and by virtue of a certain demise thereof theretofore made, and at and under a certain yearly rent, to wit, the yearly rent of 26*l.*, payable quarterly, to wit, on the 25th of *March*, the 24th *June*, the 29th *September*, and the 25th of *December* in every year: that the said

Where several matters are alleged in a declaration as a consideration for the defendant's promise, one of which is nugatory, yet if the rest afford a sufficient consideration, the promise laid will be supported.

In cases of past or executed considerations, it is necessary to state that the consideration laid for the defendant's promise moved from the plaintiff, at the special instance and request of the defendant; but not in assumpsit on an executory consideration.

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W. Sears in his lifetime, being so indebted as aforesaid, he the said *W. Sears* deposited with the plaintiffs, as executrix and executors as aforesaid, as a collateral security for the said debt, a certain bill of exchange, bearing date the 12th *March* in the year aforesaid, drawn by the said *W. Sears* on and accepted by one *J. Fabian*, for payment, five months after date, to the drawer's order, of the sum of 16*l.* 1*s.* value received, and which said bill of exchange, at the time of the depositing of the same as aforesaid, was indorsed by the said *W. Sears:* that the said *W. Sears*, at the time of his death, was in possession of the said demised premises, under and by virtue of the said demise; and after the death of the said *W. Sears*, and up to and at and after the making the promise and undertaking hereinafter next mentioned, *Winifred*, the widow of the said *W. Sears*, and the mother of the defendant, was in possession of the said demised premises, and was then possessed of certain goods and chattels of great value, to wit, of the value of 50*l.*, and which said goods were then in and upon the said demised premises, and were then liable to be seized and distrained for the said rent: and the plaintiffs, as executrix and executors as aforesaid, then intended to distrain the same for the said rent: and the said *Winifred* was desirous of quitting the said demised premises at *Michaelmas* then next, and of removing the said goods and chattels from and off the same, (of all which said premises the defendant then had notice); and thereupon afterwards, to wit, on the 24th of *September*, in the year aforesaid, in consideration of the premises, and that the plaintiffs, as executrix and executors as aforesaid, would permit the said *Winifred* to quit the said demised premises at *Michaelmas* then next, and to remove her said goods and chattels from and off the said premises, and would forbear to distrain in

the same for the said rent so due and in arrear as aforesaid, and for the further sum of 6*l.* 10*s.*, being another quarter's rent, which would become due to the plaintiffs as executrix and executors as aforesaid, under the said demise, at the said *Michaelmas* then next, he the defendant undertook, and then faithfully promised the plaintiffs, as executrix and executor as aforesaid, to pay them one quarter's rent, being the sum of 6*l.* 10*s.*, immediately, and the remainder of the said rent within twelve months then next, the said bill of exchange being given up by the plaintiffs to the defendant: and the plaintiffs aver that they, confiding in the said promise and undertaking of the defendant, did permit the said *Winifred* to quit the said demised premises at the said *Michaelmas*, and to remove her said goods and chattels from and off the said premises, and did wholly forbear then, and always hitherto have forborne to distrain the same for the said rent as aforesaid (whereof the defendant had notice): and although the said twelve months have long since elapsed, and although the plaintiffs, as executrix and executors as aforesaid, afterwards, and after the expiration of the said twelve months, to wit, on the 15th of *October* 1834, requested the defendant to pay the said rent, being a large sum, to wit, the sum of 19*l.* 10*s.*, and also tendered and offered to give up the said bill of exchange to the defendant, which he then refused to accept: Yet, &c. Breach, non-payment of the sum of 19*l.* 10*s.* Common indebitatus counts for the use and occupation of a certain messuage and premises with the appurtenances of the plaintiff, as executrix and executors, and for money found to be due from them as such upon an account stated, laying the promise to the plaintiff as executrix and executors as aforesaid. General demurrer to the first count. Joinder.

A plea of non assumpsit to the last count.

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The following grounds were stated in the margin of the demurrer-book.

First, That by the first count it appears that the bill of exchange therein mentioned was, at the time of the making the defendant's supposed promise, overdue, and it is not averred to have been dishonoured, so that the rent of 13*l.*, supposed to have been in arrear from *W. Sears* deceased, appears to have been satisfied thereby; and the forbearance to distrain for the sum of 13*l.*, which forms part of the consideration stated for the defendant's promise, is therefore insufficient.

Secondly, That it does not appear on the first count that the plaintiffs had any right to distrain for the quarter's rent which is supposed to have been becoming due at *Michaelmas* mentioned therein; and so the forbearance to distrain for the sum of 6*l.* 10*s.* in respect thereof, which forms part of the consideration stated for the defendant's promise, is insufficient to support such promise, and renders the same of none effect.

Thirdly, That the consideration expressed in the first count, as moving the defendant to the promise therein alleged, is not stated to have been at the defendant's request, as to give the same any effect it ought to have been.

Fourthly, That it does not appear, nor can it be collected from the first count, whether the plaintiffs seek to recover against the defendant as administrator of his late father, or personally.

Erle for the defendant supported the demurrer. Though the bill was deposited as a collateral security for the rent due, the plaintiffs do not state it to have been properly presented, or that it was dishonoured by *Fabian* when due. The plaintiffs, as holders, were bound to do every act in their power to obtain payment of it; and if they did not, it became their own,

and, as money in their hands, operated as a satisfaction of the debt due from *W. Sears*, for which it was deposited (*a*). The plaintiffs should have shown on their declaration that they had done every act requisite to recovering on the bill; for if they did not, and were guilty of laches, the bill operated as a satisfaction, and that forbearance to distrain for 13*l.*, which is part of the consideration for the defendant's promise, failed. [Lord *Abinger* C. B. This action is not on the bill itself. It was deposited as a collateral security. Then the plaintiffs were not bound to set out in their declaration all the circumstances under which the bill was so deposited. They may have been such as not to make it requisite to present it. *Parke* B. The objection of neglect to present the bill might have been waived afterwards.] Then if that part of the consideration fails, the whole promise is *nudum pactum;* for the other part stated is an agreement not to distrain for rent not then due, but to *become* due on the ensuing *Michaelmas*. Then there was no consideration whatever. [Lord *Abinger* C. B. *Winifred Sears* was to be allowed to give up the possession at *Michaelmas* according to her wish. That was a privilege to her.] Being widow of *William Sears*, and not tenant from year to year as his representative the defendant was, she was a stranger to the executors of the lessor, and they could not compel her to remain on the premises with her goods. Being such stranger, she could have removed the goods before or after the rent became due, without infringing 11 *Geo. 2.* c. 19. (*b*). The declaration alleges, that in consideration that the plaintiff would permit *Winifred Sears* to quit the demised premises at

(*a*) See *Earl of Ferrers* v. *Robins*, *post*, Part 4. in the press.

(*b*) *Thornton* v. *Adams*, 5 M. & S. 38; and see id. p. 200. 2 Stra. 787., and *Bland* v. *Vaughan*, 1 Bing. N. C. 767. *ante*, Vol. III. 172, *n.* 3 Esp. 15. 2 Saund. 284, n. (2). 4 Camp. 136.

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Michaelmas then next, and to remove her goods an chattels from the premises, and would forbear to di train for the said rent so due and in arrear, and the sum of 6*l.* 10*s.* to *become* due at *Michaelmas* th next; the defendant undertook to pay the 6*l.* 10*s.* i mediately, and the remainder within twelve month the bill of exchange being given up by the plaintiffs the defendant. But as they had no right to distra on the premises for 6*l.* 10*s.* before the *Michaelma* and it appears that the goods, being those of a strange might have been legally removed before or after th day, the whole consideration for the defendant's pr mise not being proved as laid in the declaration, th promise cannot be supported. [*Parke* B. The givin up the note was one consideration; and the forbea ance to distrain the goods of *Winifred Sears*, being the premises at the time of making the agreement, f the rent of 13*l.* then due from her husband, the int tate, was another. If one sufficient consideration mains, that is enough to support the promise laid (a The consideration moving the defendant to promise not alleged to have been at his request. [*Parke* An absolute averment of the defendant's request only necessary in cases of executed considerations (b)

Judgment for the plaintiffs.

Butt for the plaintiffs was not called on.

(a) *Crisp* v. *Gamel*, Cro. Jac. 128, cited Bull. N. P. 147. See the cas collected Com. Dig. tit. Action upon the Case upon Assumpsit (B. 13.) also 2 Burr. 1082. Peake, C. N. P. 62. 1 Chitty on Pleading, 4th ed. 26 263.

(b) 1 Saund. 264, n. (1).

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SIMPSON *against* CLARKE.

ASSUMPSIT by the indorsee against the acceptor of a bill of exchange for 98*l.* 5*s.* 3*d.*, drawn by *Walker*, and made payable, three months after date, to his order; indorsed by him to *Carter* and by *Carter* to the plaintiff.

Pleas, first, that the defendant did not accept the bill: secondly, that he accepted it for the accommodation of *Walker*, without any consideration or value for his acceptance: that *Walker* indorsed it to *Carter* without any consideration or value: that *Carter* indorsed it to the plaintiff without any consideration or value: and that the plaintiff, at the time of the commencement of the suit, was the holder of the same without any consideration or value.

Replication to the latter plea, that *Carter* had a good consideration and value for indorsing the bill to the plaintiff: and that the plaintiff, at the time &c., was not a holder of the same without consideration and value. Issue thereon.

At the trial at *Guildhall* before *Gurney* B., the plaintiff produced the bill accepted by the defendant. The defendant's counsel then urged, that the bill being admitted to have been accepted by the defendant for the accommodation of the drawer, the plaintiff must go on in the first instance to prove consideration or be nonsuited. The learned baron left it to the discretion of the plaintiff's counsel to produce such evidence or not, but declined to nonsuit. Witnesses

In an action by a second indorsee against the acceptor of a bill of exchange for 98*l.* 5*s.* 3*d.*, the replication admitted that the acceptance and first indorsement were without consideration, and took issue on the point whether the party immediately indorsing to the plaintiff had good consideration for so doing. The plaintiff relied at the trial on the mere production of the bill; the defendant objected that the plaintiff was bound to prove the consideration. The judge dissented, but gave the plaintiff an option to prove it, upon which he established a debt of 57*l.*, due to him

from the drawer and first indorser, and another debt to the amount of 20*l.* 18*s.* due to him from his immediate indorser for goods sold: Held, upon this evidence, that the plaintiff was not entitled to recover more than the amount due to him from his immediate indorser.

Whether the remote holder of an accommodation bill is bound to prove consideration in the first instance, as in the case of a bill obtained by the first holder by fraud or felony, or whether the indorsement of itself primâ facie imports consideration until the defendant proves the contrary, was not decided.

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were then called for the plaintiff, who proved a debt 57*l.* due from *Walker* to the plaintiff, and a debt 20*l.* 18*s.* from *Carter* to the plaintiff at the time *Cart* indorsed the bill to him. The plaintiff claimed th whole amount of the bill against the defendant. Ve dict for the plaintiff for the whole amount of the bi with leave to the defendant to move to enter a nons or reduce the damages to 20*l.* 18*s.* A rule hav been obtained in the alternative accordingly,

Sir *F. Pollock* and *Channell* showed cause. T verdict is right. Every indorsement is in its l operation a new drawing on the original drawee. N in an action between the original parties, *e. g.* by original drawer against the defendant, the onus proving want of consideration would be thrown on th defendant; then it lies also on him in actions on th bill by its subsequent holders. But the holder of bill for value need not care for transactions betwee former holders, for the indorsement to him impor value given by him till the defendant proves the co trary. Many cases establish the principle, that an i dorsement is of itself sufficient primâ facie evidence value. In *Stratton* v. *Hill* (*a*), the court held that d would lie by the indorsee of a bill against the pe who had indorsed it to him. That shows that a dorsement by the actual drawer of a bill doe render him less amenable on that account to a bility to which he was originally subject; and *Ba* in *Priddy* v. *Henbrey* (*b*), states the true gro that decision to have been, that between the and his immediate indorsee there was privity, the indorsement implied that the indorser w pro tanto to the indorsee, and was a contra

(*a*) 3 Price, 253. (*b*) 1 B. & C

indorser that that debt should be duly paid. *Wyatt* v. *Bulner* (*a*) was an action by the indorsee of a bill of exchange, impeached for illegality of consideration as against the acceptor; and *Eyre* C. J. said, "The indorsement was of itself primâ facie evidence of a good consideration, and if the defendant meant to call on the holder to prove the consideration, it would be necessary to implicate him some way in the transaction, or to show some degree of privity or knowledge respecting it." [Lord *Abinger* C. B. That decision has been often overruled in practice by Lord *Ellenborough*, and I may say by Lord *Kenyon*.] It was held at nisi prius, in *Morgan* v. *Cresswell* (*b*), that the plaintiff, the drawer of a bill, was bound to begin by supporting his affirmative replication that there was good consideration between him and the defendant, the acceptor; but the court of King's Bench set aside the nonsuit (*c*). Again, every successive indorsement imports the same value between that indorser and indorsee, till disproved; and this whether as between the acceptor and drawer, or the drawer and first indorser, there was consideration or not. The new rules were never intended to alter the situation of parties to bills. [Lord *Abinger* C. B. A plea of want of consideration obliges a defendant to prove that want of consideration before the plaintiff is called on to prove any thing (*d*). Acceptance imports value in the first instance, according to the law-merchant; but I question whether indorsement does; for, after a long experience, I have no doubt that nine hundred out of one thousand bills which come into the hands of bankers are indorsed by parties without re-

(*a*) 2 Esp. C. N. P. 538. (*b*) 1 Moo. & Rob. 380, n.

(*c*) And see *Batley* v. *Catterall*, Mood. & Rob. 379, cor. *Alderson* B.; *Lowe* v. *Burrowes*, *id.* 381, n., cor. Lord *Denman*.

(*d*) *Lacey* v. *Forrester*, 5 Tyr. 567, *Easter* 1835; *Percival* v. *Frampton*, *id.* 579, same term.

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ceiving value, in order to get discounted or to receive the amount when due. It is not to be presumed that a banker's business is to lend money to his customer. It must therefore be taken that a banker holds a bill when paid in as agent to his customer. Were a banker sued on a bill so indorsed to him in blank, would he not be entitled to show that he had a balance of the plaintiff's overtopping it?] It is granted that, as between drawer and acceptor, a bill is not evidence of consideration; and the same principle of law applies between indorser and indorsee. [Lord *Abinger* C. B. If the indorser proves consideration for the acceptance, he may recover without proving consideration to himself, for the payee may make any one his agent to receive the proceeds of the bill. The presumption is, that the acceptor is indebted to the drawer; that the law-merchant makes that debt assignable by indorsement; and the same presumption, that the consideration exists always, extends to the subsequent parties. Is not the presumption of consideration rebutted by the admission on the replication, that it was accepted by the defendant and indorsed by *Watts* without consideration?] Whether consideration is wanting between the original or other parties to a bill, indorsement imports that value was given for it by the indorsee to the indorser. Till that presumption is rebutted, the holder need not traverse the want of consideration given by any previous parties. In *Peacock* v. *Rhodes* (*a*), the judges regretted that accommodation paper had ever been recognized by the courts. *Heath* v. *Sansom* (*b*), which will be cited for the defendant, is not the decision of the whole court, for *Parke* J. differed; and *Patteson* J. has since, in *Whittaker* v. *Bi*

(*a*) 5 Taunt. 192; 1 Marsh. 14. *S. C.*; *Laxton* v. *Peat*, 2 Camp. 18[illegible] *Kerrison* v. *Cook*, 3 Camp. 362; see *Harrison* v. *Courtauld*, 3 B. & Adol. 1[illegible]

(*b*) 2 B. & Adol. 291.

mands (a), disclaimed the opinion that, independently of circumstances of suspicion of a fraudulent transfer of the bill, the subsequent holder would be bound to prove the consideration he gave for it, because there was absence of consideration between the previous parties to it. Besides, in *Heath* v. *Sansom* there was fraud, whereas here was mere absence of consideration.

The replication does not admit it to have been an accommodation bill between all the parties except *Carter* and the plaintiff, for as the issue is joined on the general averment that the plaintiff was a holder for value, he may derive title from his immediate indorsee or a prior one.

Lastly, there cannot be an accommodation bill between debtor and creditor. Now as there was an existing debt of 20*l.* 18*s.* due from *Carter* to the plaintiff it was not necessary to show that *Carter* indorsed the bill to secure that debt. Besides that the indorsement imports value, the plaintiff showed the indorser to be indebted to him.

Platt and *Humfrey* contrà. The replication admits every fact stated in the plea, except that *Carter* had consideration for indorsing to the plaintiff. Then the defendant accepted and *Walker* indorsed without consideration. That brings the case within the opinions of Lord *Tenterden* and *Littledale* J. in *Heath* v. *Sansom*, viz. that in all cases where, from defect of consideration, the original payees cannot recover on the bill, the indorsee, to maintain an action against the acceptor, must prove consideration given by himself or a prior indorsee, though he may have had no notice that such proof will be called for (b). It is true that *Parke* J.

(a) 1 Mood. & Rob. 367; *S. C.* not *S. P.* 1 Ad. & Ell. 640.

(b) *Paterson* v. *Hardacre*, 4 Taunt. 114, had been cited.

defence there set up was, that the bill was an accommodation bill, and the report states that the plaintiff gave value for it without knowing it to be so. How could the question in that case have been raised, unless the practice had been for the plaintiff to prove consideration? The facts would never otherwise have appeared before the court at all. That case, therefore, shows the practice to have been as I have stated it, that the indorsee is bound to prove consideration in the case of an accommodation bill, in order to remove the suspicion that he was an agent of the drawer; and if the history of the cases is sifted, it will probably appear that the same proof of consideration has uniformly been given by the plaintiff as in *Fentum* v. *Pocock*, which would not otherwise have been necessary. A distinction is attempted to be made between the case of an accommodation bill and that of a bill obtained by fraud; and it is admitted, that in the latter case the plaintiff must prove consideration. That argument is rested upon the principle, that as *contrà latronem omnia præsumuntur*, because the first holder may have stolen the bill, we ought to infer that every subsequent party to it has also been guilty of fraud, and is bound to purge himself of the reflection arising from the first owner having feloniously possessed himself of it. Sir *F. Pollock* says, this is an exception to the general rule. But suppose that to be true, is it so clear that accommodation bills have nothing of fraud in their issue? I remember Lord *Kenyon* used to alarm the juries at *Guildhall* by the vigour with which he used to denounce the toleration of these bills at all. At all events, considering what they import, they do not deserve encouragement. A bill of exchange purports on the face of it to be a transaction between the parties for value, and imports primâ facie evidence of a debt or an acceptance by way of security for goods deli-

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vered? But in what condition is the public if that the circulation of bills of exchange, thus taken to be a great indication of a flourishing state of commerce and evidence of bona fide mercantile transactions, should turn out to be a currency merely fictitious, and a nullity indicative of no value whatever? And would it not be disastrous to multiply such a circulation by any facilities afforded? It may be said, that it is more convenient to have several persons lending their names in order that parties may advance their money as safely upon such an instrument as on a bond, but among the parties privy to such an arrangement, there is always an understanding that the acceptor is not to be called upon, although he is no doubt liable to a bona fide holder who has advanced his money upon the bill, and so given a reality to the transaction which it had not before. Then the effect of proving it to be an accommodation bill being to make it a mere nullity as between the parties to its conception, how can it be set up again as given for value? Why, when the first indorser in blank had no remedy against the drawer, should we infer that every indorsee, by such a blank indorsement, gave value? The inference is rather that he is only an agent to whom it is indorsed to raise money on it. At all events the presumption is as strong one way as the other, and there is nothing on the face of the document from which to presume that the indorsee had given value for it. To show that the judges have viewed accommodation bills in this light, I may refer to the language of *Mansfield* C. J. in *Pender* v. *Fobes*. In fact, it was the opinion at that time, that to use a mercantile instrument, which may have a very extensive circulation, and be supposed to represent a real transaction, but which has in fact no reality at all, was near akin to actual fraud. If then the effect is, that no bill exists between the two parties to the creation of an

modation bill, what difference is there between this case and that where a bill is stolen? At all events, there is no danger to the negotiability of bills in disabling a party from recovering who receives a bill without value, and who attempts to take shelter under a presumption of law that he has given value, and so defraud both the drawer and acceptor. We cannot so get rid of our experience as to suppose that there is something in accommodation bills so intrinsically precious that the presumption is always to be in favour of the holder. But this case does not necessarily involve the point I have been referring to. For upon the pleadings and facts the question is, whether the plaintiff is a mere agent of *Carter* or *Walker*, or a bonâ fide holder. He admits that *Walker* gave no consideration to the defendant, and that *Carter* gave none to *Walker*, but says I gave value to *Carter*. It was said that on this issue the defendant was bound to prove a negative. If the learned judge had so decided, the general question would have arisen; but as he gave the plaintiff an option, upon which the plaintiff chose to begin and to prove his consideration, he has proved that he gave value to *Carter* to the extent of 20*l.* 18*s.* and no more; yet he asks for the whole amount, because he says it must be presumed that he gave the whole value; but that would be too violent a presumption in the face of these facts. To the amount of 20*l.* 18*s.* the plaintiff is doubtless entitled to retain his verdict; but it is said that *Walker* the drawer also owed the plaintiff money. That very circumstance illustrates the suspicion attaching to accommodation bills, for it seems that *Walker*, who gave nothing for the bill, was disposed, if he could, to pay his own debt to the plaintiff with it; but he is not entitled to take advantage of the bill to pay himself the debt due to him from *Walker*; he has alleged no dealing at all between *Walker* and himself. On this state of facts,

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and on this record, I think the rule must be absolute to reduce the damages to the sum of 20*l.* 18*s.* (a).

PARKE B. was at chambers.

BOLLAND B.—I am of the same opinion. Without entering into the general question, which does not arise in this case, the plaintiff is entitled to a verdict for 20*l.* 18*s.*, to which extent he clearly proved consideration. Upon the general question, I should incline to the opinion of the majority of the court in *Heath* v. *Sansom*. The ruling of Lord *Tenterden* in *Thomas* v. *Newton* (b) goes to the same extent, and the doctrine there laid down is that on which, so far as my experience goes, the courts have always proceeded in practice.

GURNEY B.—Undoubtedly the practice has been for many years as stated by the lord chief baron, that after evidence given to disprove the consideration given for a bill or note, the holder has been held bound to prove it. It is but lately that the distinction has been taken between accommodation bills and bills obtained by fraud or felony, in which latter case the most remote holder is held bound to purge himself of the suspicion attached to the mode in which it was originally obtained. As an accommodation bill is sent into the world for the purpose of raising money on it, the reasonable presumption arising from its being found in the hands of an indorsee is, that money has in fact been raised on it. The question will, I hope,

(a) On this case being cited in *Isaac* v. *Farrar*, 1 Tyr. & Gr. 286, *Lord Abinger* said, that he never meant in *Simpson* v. *Clarke* to say that the mere fact of a bill having been given for accommodation threw the burden of proof of consideration on the holder, but that he was of opinion that the other party must go further and prove fraud before such onus could be cast on the holder.

(b) 2 Car. & Payne, 606.

cases be brought before all the judges, that no doubt may rest upon it, being, as it is, not only very important, but also of every days' occurrence. Here however the question does not arise: the plaintiff chose to begin and to prove consideration: he has proved consideration to the amount of 20*l.* 18*s.* to *Carter*, and it is impossible on these pleadings to import into the case the consideration given to *Walker*.

Rule absolute to reduce the damages (*a*).

(*a*) See *Mills* v. *Barker*, 1 Tyr. & Gr. 287, n.

BLAKEMORE and BOOKER *against* The GLAMORGANSHIRE CANAL COMPANY.

A., while solely possessed of certain iron works, sued certain parties for diverting water from them, and obtained a verdict and judgment. He subsequently took into partnership *B.*, who had been examined as a witness at the trial. *A.* and *B.* afterwards sued the same defendants for a similar injury committed by them since the former trial. Held, that the verdict and judgment in the former cause were admissible in evidence against them, for *B.* was disinterested when he gave his testimony, and the primâ facie evidence abundantly showed the privity of estate between the present plaintiffs and *A.*

CASE for diverting water. Plea, general issue. At the trial before *Alderson* B. at the last summer assizes, a verdict was found for the plaintiffs. In

By a canal act, 30 *Geo.* 3. c. 82. s. 7., the owners of certain works called the *Pentyrch* works, were entitled to all the surplus water, or such as *should not be necessary for the use of the canal.* By a subsequent act, 36 *Geo.* 3. c. 69., the canal company were required to finish the canal and all the *works* and extension of the same within two years, and were prohibited from making alterations in it after that time. After that time, however, they erected an engine for the purpose of forcing up water from a river into the canal above the *Pentyrch* works, by which increase in the quantity of water, the canal became deep enough to pass down a greater number of boats than it could have done before. Held, that the diminution of the supply of surplus water to the *Pentyrch* works, in consequence of the increased trade, was actionable by them, and that they might recover consequential damages.

It was also enacted, that for the purpose of better securing the surplus water for the benefit of the *Pentyrch* works, the lock which should be made below and nearest to them, should always be kept in good and sufficient repair by the canal company, for the purpose of preventing leakage or the waste of water, &c. The canal company made a notch or drawgate, by which they supplied the lower part of the canal with water at a point below the lock, directed by the act to be kept water-tight. Held, that they had no right to convey water, not necessarily used at that lock, in passing vessels through it down the canals to any lower pond of it, though wanted there for the purposes of the navigation; and that the notch was a *work* not authorized by the act.

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BLACKMORE and Another v. GLAMORGANSHIRE CANAL COMPANY.

Michaelmas term *Maule*, for the defendant, obtained a rule nisi for a new trial. Cause was shown in last term, and the case was argued at great length during several days, in that and the present term, by *Ludlow* Serjt. and *R. V. Richards* against the rule, and Sir *John Campbell* (A. G.), *Maule*, *Talfourd* Serjt. and *E. V. Williams* in support of it. The court took time to consider. Their judgment was now delivered by

PARKE B. (*a*)—This cause was tried before my brother *Alderson* at the last summer assizes for the county of *Gloucester*, and a general verdict found for the plaintiff. A motion has been made for a new trial, and the case fully argued before my brothers *Bolland*, *Alderson*, *Gurney*, and myself, on several grounds, which will be fully stated and considered: but it will be proper first to state the circumstances under which these questions arise.

The act of parliament for making the *Glamorganshire* canal, 30 *Geo.* 3. c. 82., passed in the year 1790; its course was from *Merthyr Tidvil* to a place called the *Bank* near *Cardiff*; the principal supply of water was to be obtained from the river *Taaffe*. It appears, that before that time, mills and iron works had been established, which employed a considerable part of the waters of that river, and were entirely dependent upon them. If the proposed company could not construct their canal, without depriving these mills and iron works of the water required for their use, it would be necessary to buy up their interests. If the two could exist at the same time, that is, if there was water sufficient for both, then it would become necessary that means should be taken that the construction of the

(*a*) The comprehensive nature of this judgment renders it quite superfluous to repeat the facts and arguments of this often litigated case.

canal should not deprive the mills and iron works of any portion of the water, to which they were by law entitled. The latter was the course pursued, and clauses were introduced to give protection to those prior interests which were entitled to the preference.

The 4th section is framed for the protection of the mills and iron works of the earl of *Plymouth*. By that section, those mills were protected in the complete enjoyment of all the water of the river, and the company were prohibited from taking even the lockage water from one level of the canal to the other; for that clause provides, that the lockage water shall be discharged, when the lock is filled from above, direct into the river *Taaffe*, and not through the lower gates of the lock. A different and more limited protection is however provided by the 5th, 6th, and 7th sections, which were framed for the protection of the *Melin Griffith* works and the *Pentyrch* works, by appropriating to them, not the whole water, but only the surplus water, after that which was required for the use of the canal had been first subtracted.

The 7th section is most material (a), and the con-

Sect. 7. Provided also, and be it further enacted, that a proper weir shall be made upon the side of the said canal by the said company of proprietors, above the weir already erected upon the river *Taaffe*, for conveying the water from the said river to the iron works belonging to *William Lewis* Esqr. called *Pentyrch* works, in some place between the *Brook* at *Nantgarw* turnpike, and the said weir already erected for securing the surplus water, or such as shall not be necessary for the use of the said canal, for the benefit of the said iron works aforesaid; which weir shall be kept in constant and sufficient repair, at the expense of the said company of proprietors; and for better securing such overplus water for the benefit of the said *Pentyrch* works, the lock which shall be made on the said canal below and nearest to the weir already erected as aforesaid, shall always be kept in good and sufficient repair and condition by the said company of proprietors, for the purpose of preventing leakage or waste of water; and in case such lock shall at any time be found out of repair, or any ways defective for the purpose

69.) reciting, that the company had raised the
which they were empowered by the act to ra
they had expended that sum in carrying on
canal and other works, but found that it would
a further sum to finish and complete the same
ing further, that they were extending the ca
from the place called the *Bank* to a place ca
Lower Layer below the town of *Cardiff*, whic
completed and made part of the said canal, wou
public utility. It then gave power to make th
sion, and to raise 10,000*l.* more for that purp
prescribed the manner in which the money shal

aforesaid, and the said company of proprietors shall not forth
notice given to them or any of their agents, by writing under
the said *William Lewis*, or the proprietor or proprietors of th
works, of such lock being out of repair or defective as aforesaid,
such case it shall be lawful for the said *William Lewis*, or such
prietor or proprietors of the said iron works, to cause such lo
paired or amended in such manner as he or they shall think n
rendering the same effectual for preventing any leakage or wast
and the expenses thereof (to be settled by the said commissioner
any disagreement touching the same) shall be reimbursed and
said *William Lewis*, or such other proprietor or proprietors of t
works, by the said company of proprietors; and the said compa
prietors are hereby also empowered, by themselves, their agents
men, to make such reservoirs and such and so many feeders and
and also to erect and set up such engines, and other machines fo
the said canal and reservoirs with water, for any other purpose
for the said canal, and to convey water from any such reservoir

ployed. And by the 3rd section it was provided, that the said works and the extension, and all other works incident to the canal and extension, should be completed within two years next after the passing of the act. That act received the royal assent on the 26th of *April* 1796. The 26th of *April* 1798, therefore, was the limit of the completion, both of the original canal and the extension. After the expiration of these two years, to wit, in 1809, the company, at a spot higher than the *Pentyrch* works, erected an engine called the *Pontyrein* engine, which by increasing the supply of water at the upper parts of the canal, by pumping an additional quantity from the river *Taaffe*, enabled the company to pass down a greater number of barges than could have been passed down by the supply of water from the *Taaffe*, according to the original construction of the canal. This would necessarily occasion an increased expenditure of water in the locks below, and would prevent the same quantity of water going over the weir, erected in pursuance of the seventh section, called the Parliamentary weir, for the use of the *Pentyrch* works, as had gone over previously. But this, it is said, was not complained of, until another operation was performed, viz. the deepening of the sea lock, by which not only the traffic of the canal was extended, but even a new species of traffic (the carriage of coals) introduced. This occasioned a still larger demand of water from above, and further diminished the supply of water passing over the Parliamentary weir to the *Pentyrch* works. In 1827, the plaintiff brought an action against the company for the injury which he conceived he had sustained, from the abstraction of water, both from the *Melin Griffith* and *Pentyrch* works. By the erection of the *Pontyrein* steam engine, the deepening of the canal, the

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making the sea lock, and the diversion of the water by what was called the Fraudulent weir, he obtained a verdict with entire damages on the whole declaration. The company sued out a writ of error into the Exchequer Chamber, and the judgment for the plaintiff was affirmed. The company sued out a writ of error into the House of Lords, and there too the judgment was affirmed in 1832.

This judgment was given in evidence at the trial of this cause. Notwithstanding this judgment in the House of Lords, the company has persisted in the use of the *Pontyrein* engine and the sea lock, by both of which they have abstracted water from the plaintiff's works; and although they have apparently removed the injury arising from the weir called the Fraudulent weir, by placing, at the dry season of the year, boards therein, which, as well as the locks, they have made and carefully kept water-tight, yet they have substituted for the Fraudulent weir, by which water formerly was supplied to the lower parts of the canal, a notch placed near the lock next below the weir called the Parliamentary weir.

This notch consists of a drawgate suspended above a fixed sill, and is managed so that by being kept constantly open at a given depth, the aperture being capable of regulation as to size, a given and limited quantity of water is kept continually flowing down to the lower levels of the canals, so as to supply the deficiencies arising from the original construction of the canal and the increased traffic therein. It is apparent therefore, that this is only the old Fraudulent weir in a limited and regulated state.

The learned judge was of opinion, on the trial, that this notch was not authorized by the 7th section. He was also of opinion that the plaintiffs were entitled to

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recover damages arising from the greater consumption of water from the increased trade on the canal, if such increased trade was occasioned by the unauthorized acts of the company; and the jury found for the plaintiff with 500*l.* damages.

A rule nisi for a new trial was obtained on these three grounds; first, that improper evidence was received; secondly, that the learned judge misdirected the jury; thirdly, that the verdict was not warranted by the evidence. The first objection was, that the verdict and judgment in the former action, in which *Blakemore* alone was plaintiff, were received in this action, brought by *Blakemore* and *Booker* against the canal company, the issues on both being similar; and it was contended that it was inadmissible, first, because there was no sufficient evidence that the present plaintiffs were privy in estate to the plaintiff in that action; and if they were, secondly, that the circumstance of *Booker* having been examined as a witness in that case, would prevent his making use of that verdict. We are all of opinion that this objection is unfounded. There is no doubt that a verdict for an owner of an estate, upon a question relating to the rights and easements belonging to that estate, is evidence for another claiming under him; and in this case there was proof that Mr. *Blakemore* was in possession of the works when the former cause of action accrued, and that he and *Booker* were so at the time of the present cause of action; and this is, without doubt, abundant primâ facie evidence that the present plaintiffs were privy in estate to the former plaintiff.

Does it then make any difference that one of the plaintiffs was himself a witness in the former suit when he was disinterested? We are of opinion that it does not. The case being brought within the general rule, that a verdict on the matter at issue

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is evidence for and against parties and privies, no exception can be allowed in the particular action, on the ground that a circumstance occurs in it which forms one of the reasons why verdicts between different parties are held to be inadmissible, any more than the absence of all such circumstances in a particular case would be allowed to form an exception to the general rule, that verdicts between other parties cannot be received; it is much wiser and more convenient for the administration of justice to abide as much as possible by general rules. Nor is there any authority to be found which, when properly understood, is in favour of such an exception. There are dicta of very learned judges at nisi prius, in cases in which, when they are properly rejecting records which were inadmissible on the principle of res inter alios acta they assign one reason which exists in the particular case, instead of relying on the general rule. These are the dicta of Lord *Ellenborough* in *Smith* v. *Rummens* (a) and Lord C. J. *Mansfield* in *Hathaway* v. *Barrow* (b); there are also to be found cases in which the courts, exercising their equitable jurisdiction, have refused to admit parties to avail themselves, on motions, of convictions of perjury obtained by their own evidence, and that on account of the inconvenience which it would occasion if a practice of this kind were allowed; such are the cases of *Burdon* v. *Browning* (c), *Bartlett* v. *Pickersgill* (d), contrary to what is said in *Rex* v. *Eden* (e); yet it is to be observed, that in these cases it is admitted that the conviction must have the legal effect of disqualification, and that in a suit in which the witness, upon whose testimony the conviction proceeded, was himself a party.

On the other hand, the established practice in courts of equity affords a strong analogy in favour

(a) 1 Campb. 9. (b) Ib. 151. (c) 1 Taunt. 532.
(d) 4 East, 577; 1 Eden, 515. (e) 1 Esp. 97.

of admitting the evidence of this record, and making no exception in the particular case. The mode of proof in those courts is by depositions, which are admissible when taken in the same cause. No exception is allowed in a particular case in which a person becomes a party who had been a witness, and such a party may avail himself of his own deposition (a), *Goss v. Tracy* (b); and this authority is no way affected by the decision in *Tilley's* case (c), for that was a case at law, in which depositions on a bill to perpetuate testimony made by a person who became a party were rejected; but it was a sufficient ground for the rejection, that no deposition by any one would be admissible, while the party was alive. We are therefore all clearly of opinion, that the verdict was admissible evidence in the present case, although Mr. *Booker*, who is a party to this action, was examined on the former trial.

The second head of objection is, that the learned judge misdirected the jury, and that in three respects. First, in the construction of sect. 7. of 30 *Geo.* 3. c. 82; secondly, as to the right of the plaintiffs to recover consequential damages for widening and deepening the canal; thirdly, their right to similar damages for erecting the *Pontyrein* engine.

It will be more convenient, and will facilitate the consideration of the first question, if we now dispose of the two latter objections, upon which the court feel no difficulty, and entirely concur in opinion.

First, then, as to the right of the plaintiffs to consequential damages for the alteration of the canal and the erection of new works. It is now too late to discuss the right of the company to enlarge or deepen the canal after it was made, still more after

(a) 2 Maddock's Practice of the Court of Chancery, 426.
(b) 1 Peere W. 288. (c) 1 Salk. 286; S. C. 2 Ld. Ray. 1008.

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the extended period allowed by 30 *G.* 3. ha
that is, the year 1798. This question must
considered as settled by judicial decisions, if
tion ever was. The deliberate opinions of L
Lord *Lyndhurst*, and Lord *Wynford*, have c
that these acts of parliament constitute
or bargain between the public and the com
the company should not enlarge, widen,
deepen the canal after it should be comple
all events, after the additional time allowe
liament had expired; and that they are li
suit of individuals if they afterwards do
way as to produce damages to their legal rig
effect of this contract was, that the compan
a parliamentary right to so much water as
sary, under any circumstances of increased
nished trade, for their canal when so comple
no more; and the mill proprietors retained
to all the residue, which the company wer
legally responsible for taking away. The
Lord *Brougham*, in 1 *Mylne* & *Keene*, 186
respect in no degree at variance with t
other noble and learned lords; on the
lordship intimates his concurrence with t
The same prohibition which prevents
from enlarging their canal, prevents them
a new steam-engine in a different situ
that existed before, if the rights of the
thereby injured: and this was in effect
case in the House of Lords, for it for
of one of the counts (the 10th) in th
that case (*a*). The decision of the
Bench in *The King* v. *Glamorgansh*
pany (*b*) is no authority to the contra
question between the freighter and t

(*a*) 1 Clark & Finelly, 265.

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that authority was fully considered in the House of Lords.

The widening and deepening the canal, and the erection of the engine not being authorized, if they were prejudicial to the interests of the plaintiffs, the only question remaining on this part of the case is, whether, in order to support an action, a *direct* injury to the plaintiffs' works must be proved, as the immediate taking of surplus water; or whether it is not enough to show that the ultimate consequence was the abstraction of such water by the increased traffic occasioned by the improvement of the canal.

This question has been already considered by Lord *Eldon*, and it is impossible to read the report in 1 *Mylne & Keene*, 168, without being satisfied that he was clearly of opinion, that if the traffic on the canal was increased by the act of the company, not authorized by the two statutes, and thereby an increased quantity of water was taken for the purposes of the canal, and the surplus water appropriated to the plaintiffs was diminished, the company were liable to an action; and it is difficult also to suppose that a verdict could have been found on the trial of the second issue before Lord *Wynford*, referred to in 1 *Mylne & Keene*, 169, except upon the same principle. We do not place any reliance, with reference to this question, on the judgment of the House of Lords on the writ of error, because, as it proceeds on the record itself, it affords no satisfactory authority in favour of the plaintiff; for the record does not state whether the damage was immediate or consequential; and Lord *Lyndhurst*, in giving judgment, does not express any opinion on this subject. But there is certainly nothing in that case which throws any doubt on the correctness of Lord *Eldon*'s opinion, and though Lord *Brougham* appears to have hesitated in acquiescing in it, there is nothing in his lordship's judgment which necessarily shows that he held a contrary opinion; he

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refused an injunction indeed as to new works, except those which would directly diminish the quantity of water; but it does not follow that his lordship would have thought that damages could not have been recovered for such abstraction; and he also expressed an opinion, that the principle could not be applied to the improvements of existing locks and engines, whereby the expense of the navigation should be diminished and the tolls reduced, and so indirectly the trade increased, which is quite a different point from that at present under our consideration.

Thus stands the question on authority; and on principle it is difficult to say that there is any distinction between those acts which occasion direct, and those which cause consequential damage. If the defendants have taken away a part of the surplus water secured to the plaintiffs by the parliamentary bargain above-mentioned, by the violation of the bargain on their part, is it material whether it be done directly or indirectly? The acts complained of being prohibited, if they are prejudicial, does it make any difference that the prejudice is more or less remote, provided it be clearly traced to the prohibited acts? The difficulty of proof is no doubt increased, but when the proof is accomplished, and the damage connected with those acts, the result must be the same. We are therefore of opinion that the learned judge did not misdirect the jury as to the liability of the defendants to consequential damage for the alteration in the canal or the erection of the *Pontyrein* engine.

It remains to consider whether there was any mistake in the construction of the seventh section which has been before stated. The learned judge was of opinion that the notch above described was a violation of the seventh section, by which it is provided, that the surplus water, or water not necessary for the use of the canal should be conveyed to the *Pentyrch* works by means

of the Parliamentary weir: and he thought that the meaning of these words was, water not necessarily expended in the use of the canal; that is, water not used at this lock in passing vessels down the canal. My brother *Alderson* retains the opinion which he expressed at the trial, and my brothers *Bolland* and *Gurney* concur with him. I own I have felt considerable doubt as to its propriety; nor can I now say that those doubts have been entirely removed; but as the majority of the court are satisfied that the construction put on the clause by the learned judge is correct, the objection made to it must be overruled.

The question is, what is the meaning of the terms "*water not necessary for the use of the canal?*" The construction contended for by the defendants is, that these words give them a full right to take from this part of their canal any quantity of water which may be necessary for the continuous use of the canal at any other point of it in short water times, in consequence of the unequal lengths of the ponds below, or the inequality of the locks; and that water from the pond in question was necessary within the meaning of that term, though a similar quantity might by an expensive process have been pumped up from one pond below into another, because the legislature cannot be supposed to have contemplated that such an unusual supply should be resorted to. It was further argued, that the provision requiring the locks next below the Parliamentary weir to be water-tight, upon which the learned judge relied at the trial, affords no inference against the right of the company to make an aperture for the passing of the necessary water, because the provision is explained on the supposition that it was intended to permit the escape of water when it was not wanted. On the other hand, the argument on behalf of the plaintiffs is, that if the defendants have a right

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to make a notch, they have equally a right to ha
down water when necessary to the lowest pond of th
canal, and that so extensive a construction of this clau
could hardly have been within the contemplation of th
legislature, or of the parties to the bargain, that
division and appropriation of the water of the Taff
was made. That it was undoubtedly intended to giv
some protection to the proprietors of the Pontypri
works is clear, but this construction would put them
entirely at the mercy of the company, or compel them
to have a watch established over an extent of severa
miles, in order to protect their interests effectually; a
inconvenience so great as to leave them really without
remedy. To obviate this mischief, therefore, it i
argued that a more limited construction should be pu
upon the clause in question, which would give to th
mill proprietors all the water not used at the lock i
question in passing vessels; and if so, a very obviou
and sensible effect would be given to the provisio
that the lock in question must be water-tight; a pro
vision which, although not entirely insensible, if the de
fendants construction were adopted, seems to have bee
a provision worth making if that construction be a tru
one. It is also observed on the part of the plaintiff
not to be immaterial that this very construction ha
been practically adopted by the company themselves—
the *Melin Griffith* works, the clause protecting whi-
is framed in precisely the same words as those wh-
we have been considering. If this be so, the notch
which this provision would be clearly evaded would
illegal, and the learned judge's direction right.

There is also another point of view in which th
direction may be supported. By the provisions of th
different acts of parliament, it is clear, as has bee
before stated, that the authority of the company t
make new works ceased in 1798, and that they ar

responsible for all damages resulting from works subsequently erected. Now, supposing that the more enlarged construction of the protecting clauses were adopted, still the company would only have a right to take water necessary for the use of the canal by the mode adopted when the canal was finally constructed in 1798, and could have no right by a new construction to take more water, or to make the water communicate more conveniently between different ponds of the canal, if that produced damage to the plaintiffs. If, for instance, there were no communication except through the lock in 1798, the company could, it may be contended for the plaintiffs, have no right to make any communication afterwards. Or, if there were such a communication in 1798, and that had been by a feeding weir originally, the company would not now have a right to substitute a draw-gate, a different thing, by means of which water flowing continually is carried to the lower pond under different circumstances. The new draw-gate, therefore, or notch, is, it may be said, a work not authorized by the act to be made; and if so, the direction of the learned judge was correct. For these reasons, which have been stated as an answer to the defendants' argument, my learned brothers are all of opinion that the construction put by my brother *Alderson* on the seventh section was right.

I must own that I am not free from the doubts upon that question which have been excited by the able arguments for the defendants, and that I do not feel quite satisfied that the notch is a new *work* in the sense above ascribed to that word, and therefore unauthorized, as it may perhaps be considered as a modification of an old one, whereby it is indeed less injurious to the plaintiffs; but I am not prepared to say that I think the opinion of my brothers is not well founded, and therefore this objection also must be overruled.

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The last objection is, that the verdict is against the evidence; for that, admitting the defendants to be liable to consequential damages, there was none which ought to have satisfied the jury that even any remote damage was occasioned by the widening and deepening the canal and erecting the *Pentyrein* engine. There was however sufficient evidence that a part of the increased traffic was attributable to the improvement in the navigation of the canal, by the acts complained of; and there was reasonable ground for the jury to conclude, that though the enlargement of the canal, by allowing the increasing of the tonnage of each vessel, diminished the expense of water, the increase of trade more than counterbalanced that advantage, and that on the whole more water was consumed by such increased traffic than before. There was no doubt a difficulty in ascertaining the amount of the damage so occasioned; but that is purely a question for the jury, and it is not possible for us to say that they have done wrong.

We are therefore of opinion, for the several reasons above given, that the rule ought to be discharged.

Rule discharged.

CALDWELL and Another *against* BLAKE.

Where serviceable process was issued against two, but the declaration was against one only, the proceedings are regular.

CRESSWELL moved to set aside the declaration for irregularity in being against one only, whereas the writ of summons served had been against two. By *Reg. Gen. M.* T. 3 *W.* 4. No. 1, [*Ante*, Vol. III. p. 1.] "every writ of summons, capias, and detainer shall contain the names of all the defendants, if more than one, in the action, and shall not contain the name or

names of any defendant or defendants in more actions than one.

Per Curiam (*a*). There is at present no irregularity, for it does not yet appear that this writ contains the name of a defendant in any other action.

Rule refused (*b*).

(*a*) Lord *Abinger*, *Parke*, *Bolland*, and *Gurney* Bs.

(*b*) The rule is different in the case of bailable process, where a defendant is arrested on a writ against him and another, and the declaration is against him only; *Woodcock* v. *Kilby*, clerk, 1 Tyr. & Gr. 301, where the above case was cited.

CRISP *against* GRIFFITHS.

Debt on a promissory note. Plea, that after the making of the note and accruing of the debt in respect thereof, the plaintiff drew a bill of exchange on the defendant, which he accepted, and *delivered to the plaintiff, who took it for and on account of the note*, and afterwards indorsed it to a person unknown to the defendant, and who at the time of the commencement of the suit was the holder thereof, and entitled to sue the defendant thereon. Replication, *de injuriâ suâ propriâ*, and demurrer thereto. Held, that the first fault was in the plea, which was bad for not averring that the bill was given by the defendant in satisfaction of the note, or that the plaintiff accepted it in like manner.

DEBT on a promissory note, bearing date 31 *July* 1834, whereby the defendant promised to pay to the plaintiff, or order, at Messrs. *Farley* and Co. bankers, *Worcester*, the sum of 12*l.* for value received, two months after the date thereof, which period had then elapsed.

Plea, that after the making of the said promissory note and accruing of the said supposed debt in respect of the same, to wit, on the 10th *August* 1834, the plaintiff drew his bill of exchange on the defendant, and thereby requested him to pay to the plaintiff's order 25*l.* as for value received, at a certain period after the date thereof, and which period hath long

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since before the commencement of this suit elapsed for and on account of the said promissory note, and the defendant then accepted the same and delivered it to the plaintiff, who then took it for and on account of the said promissory note, and the plaintiff after wards and before the commencement of this suit, viz. on the 27th indorsed and delivered the said bill, accepted by the defendant as aforesaid, to a certain person to the defendant as yet unknown, and who is not the plaintiff, at the time of the commencement of this suit, was still the holder thereof, and neither to sue the defendant therein.

Replication, that the defendant, of his own wrongful and without the cause in the plea alleged, neglected to pay the amount of the note.

Demurrer, assigning for special causes, that the replication, instead of the general denial therein contained, ought to have traversed or denied, or confessed and avoided some one or more of the facts stated in the plea in express words, and also for that the general replication de injuriâ is not the proper replication in an action on promissory note, and also for that the replication is too large and general. Joinder in demurrer.

Humfrey in support of the demurrer. The replication should have traversed one only of the facts pleaded, and taken express issue on it. As it stands it puts in issue every fact alleged in the plea, though the ground of defence there relied on is not composed of several facts going together to constitute one single issue, or is it pleaded in mere abuse of the plaintiff's contract, so as to make the general replication de injuriâ good, under *Crogate's* case (*a*): on the contrary the plea in substance alleges as a complete answer

(*a*) 8 Co. 132; Stephen on Pleading, 293, 294, 274.

the action, that the plaintiff, by taking and indorsing the bill, has suspended his right to sue on the note, till the bill is dishonoured. *Kendrick* v. *Lomax* (a).

Lord Abinger, C. B. You seek to make the plaintiff traverse in his replication one fact only out of several alleged in the plea (b). Does this plea amount to more than a suspension of the right to sue on the note, while the bill negociated by the plaintiff was running in the hands of another person? It does not amount to an extinction of the debt on the note. Suppose that instead of stating in the plea the facts relied on as constituting a suspension of the plaintiff's right of action, the defendant had pleaded generally that the plaintiff's right of action was suspended, the replication must have been general, and the defendant must have proved his whole case. *Parke, B.* No such replication as this never appeared in the old pleadings in trespass, though there were many opportunities for it in that form of action.

W. H. Watson, for the plaintiff. The general replication de injuriâ is justified by the plea, for it alleges several facts constituting only one defence, and is mere matter of excuse for non-payment of the bill. The third plea in *Kennelaby* v. *Morgan* (c) did not allege an indorsement over by the plaintiff, to whom the note had been indorsed. *Parke, B.* There the plaintiff had the security of a third person, the maker of the note. Here the bill being drawn by the plaintiff and accepted by the defendant, and being over-due at the commencement of the suit, the averment of its being

(a) 4 ante, Vol. II. 438.

(b) See Anon. Ca. xlvii. Saville, 19; Com. Dig. tit. Prerogative, (D 75.) The king, by his prerogative, may traverse all the facts laid in a plea, though a common person can traverse but one.

(c) 5 T. R. 514.

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indorsed over by the plaintiff, so as to expose the defendant to a suit by a third person, was essential in order to show an extinguishment of the debt on the note. The right of action was transferred, whether the bill was indorsed over before or after due. The third resolution in *Crogate's* case is, that a general replication de injuriâ is bad when by the defendant's plea authority is mediately or immediately derived from the plaintiff, though no interest is claimed from him. Now the indorsing and letting another hold the bill may be an authority from the plaintiff, which he should have answered by a special replication.] It is submitted that the matter pleaded is rather an agreement between the parties than an authority from the plaintiff. In *Richards* v. *Murdoch* (a) de injuriâ was replied to a plea in covenant, though that was not an action in form ex delicto. [*Parke* B. There was no special demurrer in that case.] It would however have been desirable for the defendant to have compelled the plaintiff to traverse the concealment, or the materiality only, that it may be fairly taken as considered not to be demurrable. *Carr* v. *Hinchliff* (b) was assumpsit for goods sold; and the defendant, by his plea, claimed to set off against the plaintiff a debt due to him from the plaintiff's factor, who had sold the goods as his own: on demurrer, the plea was held good as matter of law; and *Bayley J.* observed upon the argument that the plea imposed a hardship on the plaintiff, as it compelled him to admit one-half the defendant's case, that that argument could not be adopted as a ground for holding the plea bad; and added "I am not prepared to say that the plaintiff might not have framed his replication so as to put in issue both the sale by the factor, as alleged in the plea, and the debt stated to be due from him to the defendant. Those two facts consti-

(a) 10 B. & Cr. 527. (b) 4 B. & Cr. 547.

one matter of defence; and the replication suggested might probably be supported by *Robinson* v. *Raphael* (a) and *O'Brien* v. *Saxon* (b)." [*Alderson* B. These are cases in tort, in which the defence was bankruptcy, a matter composed of various facts, the [illegible] of one of which shows that there is no bankruptcy.] *Bardons* v. *Selby* (c), a case of replevin, [illegible] the rules of pleading to be invariable, whatever [illegible] the form of action; and as all the facts stated in the [illegible], though multifarious, led to one subject-matter of defence, the plea in bar de injuriâ was held good. [*Alderson* B. The judges there considered themselves [illegible] by the strict course of precedent, though contrary to the opinion of Lord *Tenterden*.] The scarcity of instances of replications of this nature in assumpsit is consequent on the plea of the general issue having so much prevailed in that form of action. The new rules of pleading were framed by the judges who decided *Bardons* v. *Selby*, yet though they permit a defendant by several pleas to traverse every fact in a count, they leave the replication as before. The rule against duplicity only applies where two answers are set up in one pleading, and nothing in it prevents a party from denying several facts in it. If this replication is not allowed, a defendant who had pleaded any number of false facts, would compel a plaintiff to admit all but one, which he answered specially in his replication. [*Parke* B. The first question is, whether several facts can be put in issue by a replication, and if they can, whether this replication is sufficient for that purpose.] The precise form of traverse is immaterial. This form has been held good in replevin, *Selby* v. *Bardons*.

(a) 1 Burr. 316. (b) 2 B. & Cr. 900.
(c) In Error, *ante*, Vol. III. 430, S. C., and in K. B. 3 Bar. & Adol. 2.

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In *Barnes* v. *Hunt* (a) Lord *Ellenborough* says, tha the words of the replication de injuria, "without th cause in the plea alleged," mean "without the matte of excuse alleged." [*Parke* B. No single cause i here alleged as a ground for non-performance of th promise laid. The cause of action is non-payment o the note at the day it became due. The plea is not i excuse of such non-payment, but is more in the natur of a temporary accord and satisfaction. The ques tion is, whether a replication containing a general denia of the plea is sufficient? And we must give judgmen on the record.]

Per Curiam.—The question on the replication is c great importance, but the plea seems deficient. does not aver that the defendant gave and delivere the bill to the plaintiff on account or in satisfaction the debt due from him on the note; but only that plaintiff drew it on account of the debt, and took on the same account after it was accepted by the fendant. That is not enough; nor is there a cor sponding allegation that the plaintiff accepted it holds it for or on account of the debt, as in *Kearsl* v. *Morgan*, or in satisfaction of it. That is matter substance. Without deciding the main question her both parties may amend without payment of costs.

Leave to amend accordingly (b).

(a) 11 East, 455.

(b) See *Lewis* v. *Lyster*, 1 Tyr. & Gr. 195; *Sard* v. *Rhodes*, id. 288; *Isaac* v. *Farrar*, id. 288, the court say "In *Crisp* v. *Griffiths* the plea was not matter of excuse for the breach of contract, but of satisfaction for the breach of it." See *Selly* v. *Neish*, next case.

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ASSUMPSIT for 5000*l.*, money had and received by the defendant to the use of the plaintiffs. Plea, as to so much of the said declaration as relates to the sum of 5000*l.*, therein stated to have been received by the defendant for the use of the plaintiffs, actio non, because the defendant says, &c., that the said money so received by him was the amount of the proceeds of the sale by him of divers goods and chattels, to wit, 200 tons of flax, consigned to and deposited with the said defendant by certain persons trading under the style and firm of *Petrie* and *Chapman*, as and for their own goods and chattels, with the knowledge and assent of the said plaintiffs, but which in fact were the goods and chattels of the said *P.* and *C.* and the said plaintiffs jointly, upon the terms and conditions of the said goods and chattels being a security for any money the said defendant might advance to the said *P.* and *C.*, with power of sale to reimburse himself for any such advances: and the said defendant further says, that he, believing the said goods and chattels to belong to the said *P.* and *C.*, and not knowing that the said plaintiffs were interested therein, did, after the consignment and deposit, and before the sale of the said goods, and before he knew that the said plaintiffs had any interest in the same, make divers

In an action of assumpsit for 5000*l.* had and received by the defendant to the plaintiffs' use, the defendant pleaded as to that sum, that the money so received by him was the amount of the proceeds of the sale of goods consigned to him by *P.* and *C.* as their own, with the plaintiffs' knowledge and assent, (but which in fact belonged to *P.* and *C.* and the plaintiffs jointly), as a security for any advances made to *P.* and *C.* by the defendant, with power of sale to reimburse himself for any such advances; and that he, not knowing that the plaintiffs had any interest in the goods, advanced 6000*l.* to *P.* and *C.* on the security of them, and afterwards sold them, and offered to set off that amount against the damages claimed by the plaintiffs. Replication, de injuriâ, and new assignment that the plaintiffs sued not only for the proceeds of the sale of the goods mentioned in the plea, but also for money received by the defendant to the plaintiffs' use, being the proceeds of other goods, which the defendant, by a letter to the plaintiffs, declared to be under his care on their account. Demurrer to the replication. Held, that as the plea was not mere matter of excuse, but denied the promise to the plaintiff, the general replication de injuriâ was bad; and that it was also bad for two other reasons, viz. that the plaintiffs claimed an interest in the money received by the defendant to the use of the plaintiffs, and also derived an authority immediately from the plaintiffs.

The plea was also held bad on special demurrer, for amounting to the general issue, and for duplicity.

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advances of money to the said P. and C.
amount, to wit, to the amount of 6000*l.*, or
and security of the said goods and chatte
same remaining unpaid, he did afterwards,
the commencement of this suit, to wit, on 8
said goods and chattels, and receive the sai
the said declaration and commencement o
mentioned, such being the proceeds there
further says, that he is ready and willing, a
offers to set off and allow to the said plainti
amount of the said advances which still re
owing, and unpaid to the said defendant, a
exceeds the said money in the said decla
commencement of this plea mentioned, a
amount of the damages sought to be recove
plaintiffs in respect of the said sum of m
said declaration first mentioned. Verificati

Replication, as to the said plea of the sai
by him above pleaded to the said sum of 5
mentioned, the said plaintiffs say, preclu
because they say that he the said defe
own wrong, and without the cause by hi
alleged, broke his said promise and und
the last-mentioned sum of money, in ma
as the said plaintiffs have in their said
that behalf complained against him : co
country. And the said plaintiffs furthe
the said plaintiffs brought their said
said defendant, not only for the recove
the proceeds of the sales of the
chattels in the introductory part of
plea mentioned, but also for that the
day and year aforesaid, was indebte
tiffs in 5000*l.* for money before th
said defendant to the use of the
the produce of certain sales bef

effected by the said defendant of divers, to wit, 200 tons of flax, the respective cargoes of certain vessels called the *Orb* and *Eliza* respectively, and which said flax, before the said sales thereof so made by the said defendant, to wit, on &c., the said defendant, by a certain letter addressed to him by the said plaintiffs, declared to be under his the defendant's care on account of the said plaintiffs, and that he the said defendant should hold the same according to any instructions the said plaintiffs might be pleased to give the said defendant for the sale thereof: and being so indebted, he the said defendant, in consideration thereof, afterwards, to wit, on &c., promised to pay the last-mentioned sum of money to the said plaintiffs, in manner and form as the said plaintiffs in their said declaration have complained against him, and which said last-mentioned money, so had and received by the defendant for the said plaintiffs' use, and above newly assigned, is other and different money, and the proceeds of other and different sales than those in the said plea of the said defendant mentioned. Verification.

Demurrer, assigning for cause that the replication and new assignment were double, and contained several and distinct answers to the said last plea of the said defendants, and that the replication did not traverse or deny any distinct fact or facts, but put the whole of the allegations in the plea in issue, and also in the new assignment alleged mere matter in avoidance of the plea, and so proposed a double answer thereto; and also for that the plaintiffs had not expressly or distinctly denied or confessed and avoided any of the allegations in the plea, &c. Joinder in demurrer.

The points stated for argument on the part of the plaintiff were, that the replication and new assignment were not double, inasmuch as the replication applied

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to a different subject from that in the new assignmen and further, that the replication was right in traversin the whole matter of the plea, which, though consistin of several facts, amounted to one defence only. Th plaintiffs further submitted that the defendant's pl was bad, inasmuch as it admitted a sale of the plai tiffs' goods, and a receipt of the proceeds by the d fendant, but did not show any authority to sell.

Wightman for the defendant, in support of the pl and demurrer. The plaintiffs, not content with denyi every part of the plea by their replication, subsequently some sort confess the plea, and avoid it by introduci a new state of facts in their new assignment. If, on t general principles of pleading relied on in *Burdon* *Selby* (a), the court should be inclined to admit t replication *de injuriâ* in assumpsit (b) as well as plevin, the rule against duplicity will still prevent plaintiffs from also new assigning fresh facts. For the whole plea is denied by the replication, the plain can give their whole case in evidence upon the re cation *de injuriâ*, which puts in issue the question, ther these goods are or are not the same as those m tioned in the plea. There is no replication *de inj* in trespass to land, for the replication is not t general (c). [*Parke* B. But a plaintiff may new as in actions of trespass, where that general replica has place (d). What the replication says is, that t facts stated in the plea are untrue, besides which, t money claimed does not consist wholly of the proceed of the particular goods there mentioned.]

(a) *Ante*, Vol. III. 421. (b) See now, *Isaac* v. *Farrar*, 1 Tyr. & Gr. 2
(c) *Crogate's* case, 8 Rep. 66, 2d Resol.; 2 Wms. Saund. 295, a.
(d) i. e. in trespass for assault; see Stephen on Pleading, 2d ed. 97

Maule contrà. The general replication *de injuriâ* has been much used, in assumpsit since the new rules have compelled defendants to place on the record numerous facts, the whole of which must formerly have been proved by them under the general issue. For if such replications are not allowed, and plaintiffs are obliged to traverse one fact and admit the rest, according to the ordinary rule of replying, the greatest hardships will result. *Richards* v. *Murdoch* (*a*) shows, that even before the new rules this replication was admitted in an action ex contractu. Where the trespasses charged are of an indefinite description, as in trespass *diversis diebus et vicibus*, then, though the plea of son assault demesne, on particular days stated, nominally applies to the whole declaration, the plaintiff may new assign that he sues for many other assaults within the period laid. Then seeking to recover for an indefinite sum of money in assumpsit for money had and received, is as general as the instance put in trespass; so that when the plea relates to one transaction, the replication may admit the plea, and by a new assignment set up the real cause of action to which the defendant's answer is not directed. It is admitted that the plaintiff might new assign as well as reply, had not the replication been *de injuriâ*. But the new assignment does not deny the truth of all the facts in the plea, but of some one or other of them. [Lord *Abinger* C. B. The defendant says that all the specific facts are put in issue by the replication, one of them being the identity of this money produced by the goods. *Parke* B. The defendant substantially undertakes by his plea to establish that he has applied all the sums he had received from the particular goods there described in making the advances he specifies. The plaintiffs would then have the advantage of showing that the defendant had

(*a*) 10 B. & Cr. 527.

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applied the produce of other goods to that purpose; *Barnes* v. *Hunt* (a).]

Wightman in reply. Here, as in *Barnes* v. *Hunt*, the defendant undertakes to bring the whole of the plaintiffs' case within the agreement stated in his plea. The replication then is the same as the new assignment, and puts the same matter in issue, so that the new assignment is unnecessary.

The Court took time to consider their judgment; and on a subsequent day in this term intimated that the plea was bad, and that the form of the replication was doubtful, and suggested to both parties to amend. No amendment taking place, in *Trinity* term

Lord ABINGER C. B. delivered judgment.—In the argument of this case during the last term, the principal question discussed was, whether the plaintiff could make a new assignment, as well as traverse the allegations in the plea by the general replication de injuriâ absque tali causâ. The objection to the form of that general replication was not much pressed by the learned counsel for the defendant; but it appearing to the court to be very doubtful, at least, whether the form of it was proper, it was suggested to the counsel on both sides that they should amend; but as we understand that they decline to do so, it is now necessary to give the judgment of the court.

The plea is clearly bad, as amounting to the general issue. It denies the plaintiffs' sole right to the money said to be had and received to their use in the declaration; it consists, therefore, of a traverse of the promise to the plaintiffs, which is in effect the general issue; and it goes on afterwards to allege, that the defendant retains the money sought to be recovered, as his own, to pay his advances, and that, pursuant to

(a) 11 East, 451.

the plaintiffs' licence or authority; for such is the effect of the plea. But the mode of stating this is again the general issue, because it amounts to a denial that the proceeds of the sale were money had and received to the plaintiffs' use, and consequently to a denial of the facts from which any promise could be implied; that supposing this to be otherwise, and that the latter part of the plea could be considered as pleaded by way of confession and avoidance, this plea would still unquestionably be bad on special demurrer, both as amounting to the general issue on the other ground, and for duplicity.

The replication appears to us to be bad for two reasons.

First, the plea does not contain matter of excuse for the defendant's breach of promise, but a denial of the promise to the plaintiffs. If the replication was framed with an intention to put in issue all the matters alleged in the plea, it has failed of its object; for it cannot be considered as part of the cause of the breach of promise to the plaintiffs, that the promise was not made to them: and if it be not traversed in the replication, but confessed, it is not avoided; and then the said fact stated in the plea, and confessed by the replication, is an answer to the action. This objection falls under the last cause of special demurrer.

Secondly, if we are to apply the same rules of pleading to actions of assumpsit, which have been established as to actions of trespass by *Crogate*'s case (*a*), and as to replevin by others, this plea falls under two of the exceptions therein mentioned; for the defendant claims an interest in the money, and also, by the defendant's plea, authority is immediately derived from the plaintiffs.

This general replication is therefore bad. As we

(*a*) 8 Coke, 666.

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think the replication bad, it is unnecessary to d the other question, viz. whether the new assignm bad as being double. The plaintiffs may, hou still amend on payment of costs, as there is wi doubt a real question to be tried between the par

See *Whittaker* v. *Mason*, 2 Bing. N. C. 363.

NOEL *against* RICH.

Assumpsit on a bill of exchange by indorsee against drawer. Plea, that the defendant's indorsement was in blank; that the defendant delivered the bill to *L. L.*, a person not a party to it, for the specific purpose of getting it discounted for the defendant, and paying him the proceeds; but that *L. L.* fraudulently, and in violation of good faith, and of the specific purpose laid, delivered it to another person, also a stranger to the bill, on pretence of securing a debt due to him from

ASSUMPSIT by the indorsee against the drawe bill of exchange for 100*l.* dated 14th O 1834, drawn by the defendant upon and accepte *Boyd*, payable six months after date to the defen order, indorsed by him to *Newton*, by *Newt Lewis*, and by *Lewis* to the plaintiff. Plea, that accepted the bill for the accommodation of the de ant, and without any value or consideration; the indorsement by the defendant was an indorsem blank; that the defendant never delivered the to *Newton*, but delivered it to one *Lewis Levy* that *Lewis Levy* then received, and from thence one *Lawrence Levy*, as thereinafter mentioned became possessed thereof, held the same for a sp purpose, for the sole use and benefit of the defen and not otherwise; to wit, for the purpose and in that he the said *Lewis Levy* might get the bill counted for the defendant, and that he should d

Replication, that the defendant broke his promise without the cause alleged i in his plea. On special demurrer to the replication, that the general replica injuria in assumpsit was bad:

Held, that the plea was bad in substance on general demurrer, for not st distinctly that the defendant never had value for the bill.

Semble, that the replication was good in substance, as putting in issue facts constituting the defence set up, viz. that the plaintiff was not a perso had a right to sue.

and pay the proceeds thereof upon such discounting to the defendant; of all which the said *Lawrence Levy* before and at the time when the said bill was delivered to him, as thereinafter mentioned, had notice; that the said *Lewis Levy* fraudulently and covinously, in violation of good faith and contrary to the said purpose for which he received the said bill, afterwards, to wit, on the 12th October 1834, delivered the same to the said *Lawrence Levy*; and the said *Lawrence Levy* took and received the same from the said *Lewis Levy* upon other and different terms, and without discounting the same for the defendant, contrary to the said special purpose, and in breach and violation thereof, to wit, for the purpose and under colour and pretence of securing a debt then alleged to be due from the said *Lewis Levy* to the said *Lawrence Levy*; and that the said *Newton*, *Lewis*, and the plaintiff, before and at the said time when the said bill was so indorsed to them respectively as aforesaid, and when they first respectively received the same, had notice of the premises aforesaid. Verification. Replication, that the defendant *broke his promise* without such cause as was by him in his said plea alleged; concluding to the country. Demurrer and joinder. The ground of demurrer stated in the margin was, that the general denial or replication of de injuria in an action of assumpsit to a plea consisting of several matters and causes constituting one entire defence, was not admissible and could not be replied.

Crowder for the defendant, supported the demurrer. First, the plea is good, for it shows that the plaintiff obtained the bill by means of a fraud concocted amongst the prior parties, and contrary to the specific purpose of discount, for which alone the defendant parted with it to *Lewis Levy*. Even if the plaintiff has given value for the bill, he cannot recover,

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for he is averred to have had notice of the facts rel ing it, and is therefore now suing on a bill which he had been improperly handed over to *Lawrence* Secondly, the replication de injuriâ absque tali cau misplaced in actions in form ex contractu; for, from *gate*'s case(*a*) downwards, that replication has been fined to actions of tort. It is true that *Richards* v. *doch*(*b*) and *Bardons* v. *Selby*(*c*) have in modern afforded instances of this replication in covenant an plevin. [Lord *Abinger* C. B. This is not the ordinary of a replication de injuriâ, it omits the words "of hi wrong"(*d*), and states that he broke his promise "w out the cause alleged." Under the general issue defendant must have proved all these facts, and question is, whether, since the new rules, the pl has a right to put them all in issue by his cation.] The real traverse is contained in the "without the cause alleged"(*e*); and this re tion is never allowed where the defendant claim interest in the subject-matter of the action(*f*); o tifies the act complained of, without excusin [Lord *Abinger* C. B. Is not this plea entirely ter of excuse?] It amounts to the general not to confession and avoidance; for it says, in that the defendant never made the implied promi the plaintiff, and therefore that he never broke it. how can a replication be good which does not the denial of having made the promise, and alleges that the defendant broke his promise, wi the cause alleged? The plea does not, after con

(*a*) 8 Rep. 66. (*b*) 10 B. & C. 527, 530.

(*c*) *Ante*, Vol. III. 431.

(*d*) These words are merely introductory; per *Blackstone* J. in *Earl of Rochford*, 2 Bla. R. 1170; cited 11 East, 455.

(*e*) 2 Bla. R. 1170.

(*f*) *White* v. *Stubbs*, 2 Saund. 293; *Crogate's* case, 8 Rep. 66.

ing that the plaintiff had once a good cause of action as holder of the bill, avoid it by insisting that it was discharged by matter subsequent (a), but sets up a matter occurring before action brought, which altogether justifies non-payment of the bill. [*Alderson* B. The question is, whether all the facts laid in the plea are proveable as forming one matter of excuse or justification? What is in issue but the "*cause* alleged" (b).] The replication is also bad on general principles, as tending to those cumulative issues which it was the object of the new rules to avoid, by putting the specific points in issue on the record. *Hooker* v. *Nye and another* (c) shows that this replication, if bad, is bad in substance on general demurrer.

Bayley contrà. The plea is bad, for it contains no allegation that it never was discounted for the defendant, or that he never received the proceeds. Consistently with the plea the defendant may have had the full value from *Lewis Levy*. The replication is good, for the de injuriâ is omitted (d); and all the facts stated in the plea constitute but one entire ground of defence. Then the plaintiff was bound to put in issue the whole of the entire defence. In *Crisp* v. *Griffiths* (e) the lord chief baron intimated, that if de injuriâ could not be there replied, the plaintiff might specifically deny every matter which went to show subsequent satisfaction to him for the breach of contract. Every fact alleged in the plea, except that of

(a) See *ante*, 619, *Crisp* v. *Griffiths*, as remarked on in 1 Tyr. & Gr. 288, *Issac* v. *Farrer*.

(b) *Viz.* one combined thing arising out of several facts, *i. e.* the matter of excuse alleged. See per Lord *Ellenborough*, 11 East, 455.

(c) *Ante*, Vol. IV. 777. (d) See *ante*, 634, n. (d).

(e) *Ante*, p. 619; and see per *Bayley* J., *Carr* v. *Hinchliffe*, 4 B. & Cr. 547.

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notice to the plaintiff, is more in the defendant's kn
ledge than the plaintiff's, and may be wholly false. T
why should the plaintiff be driven to take issue o
one fact of notice. *O'Brien* v. *Saxon* (a), *Se*
Bardons (b), *Piggott* v. *Kemp* (c), support this
cation in principle, though those actions were
contractu. Here the court called on

Crowder to support the plea. The plea
on general demurrer, and is not speciall
red to. [Lord *Abinger* C. B. For all tha
on the plea *Lewis Levy* might have commu
the defendant, that instead of discounting
had paid his own debt to his brother
might have thereupon paid the defendant
before this action was brought. If th
paid to the defendant the previous fra
merged. The defendant is the person
ther he received the value or not. A
plaintiff, as a remote indorsee, cannot b
that fact.] If the money had been
fendant there could be no fraud on
alleges fraud sufficiently to make it i
plaintiff to show that the defendant
ton v. *Pratchett* (d) shows that the d
had consideration though he did n
derson B. That point turned on t
word "had." Lord *Abinger* C. B
man *had* (or possessed) the co
form it took, it was sufficient.]

Lord ABINGER C. B.—It ap
to sustain this plea. For it se

(a) 2 B. & Cr. 808.
(c) *Ante*, Vol. III. 128.

the defendant was a party to the bill, without directly or indirectly receiving value for it, yet, consistently with the plea, the defendant may have had full consideration for the bill from *Lewis Levy* after all the facts relied on as a defence had occurred. The plea only alleges that *Lewis Levy* did not discount the bill for the plaintiff according to his undertaking. On the old system of pleading the plea might have sufficed to oblige *Lewis Levy* to show that he gave consideration; he may, however, have done something equivalent to it, but since the new rules the defendant was bound to allege substantively in his pleading every fact conducing to the single defence, viz. that he never received consideration; that has not been done. Were it necessary to decide upon the replication I should be of opinion that it is good. The argument against it is technical merely, viz. that the plaintiff only alleges that the defendant broke a promise, which the plea shows that he never made. Under the old general issue a defendant might show, either that he did not make the promise alleged, (*e. g.* by proof that the signature relied on was not his;) or that he did not break it. But since the new rules have confined the operation of non assumpsit, a party intending to rely on a reason for breaking his promise, must place that reason clearly on the face of the plea. If a man puts his name to a negotiable bill, a prima facie promise to pay the holder results as a matter of law from the nature of the bill. Every defence short of denying his signature is properly matter of excuse for not performing his promise. If the plaintiff by his replication may compel the defendant to prove all the facts stated in the plea, and that is the effect of this replication, it is good, for if all the facts which form the excuse are substantially put in issue, the form of words by which that is done is immaterial. The defendant does not deny that in-

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dorsement of the bill by him, which is a primâ promise to pay it to the holder; but he pleads fa a reason for breaking it; to which the plaintiff r that they are not true. That replication appears good.

BOLLAND B.—The plea appears to me to be for only stating the defence of want of consider argumentatively; so that the court is called on to an inference in favour of the defendant, which not necessarily arise from the facts pleaded; for, sistently with this plea, *Lewis Levy* might have back to the defendant, and after informing him th had misappropriated the bill to his own purposes, r have paid him the amount of it notwithstanding. all events it should have been distinctly shown tha defendant had not been paid.

ALDERSON B.—I also think that the plea is bad the same reasons. I am also of opinion that th plication is in substance good, though not per framed in the manner most apposite to the case. plea in truth amounts to alleging that plaintiff i such a person as can have a right to sue on the Then the plaintiff, by his replication, avers in stance, that the defendant did break his promis alleged in the declaration, and that the "cause" in the plea, for which the plaintiff is said not t entitled to recover, is not true.

GURNEY B.—The plea is clearly bad.

Judgment for the plaintiff, with stay of ex tion thereon till after the decision on the in an action by the same plaintiff against acceptor *Boyd* (a).

(a) See *Noel* v. *Boyd*, 1 Tyr. & Gr. 211.

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BISHTON and Another *against* EVANS.

A declaration in debt on a bond in the penal sum of 12,000*l.*, set out a condition for payment of 6000*l.* *with interest*, but assigned as a breach the non-payment of the 6000*l.*, viz. the principal only. A plea that the defendant paid the 6000*l.* *with interest* according to the form and effect of the condition, was held bad on special demurrer, for importing a fact into the plea which was not alleged in, or necessarily to be implied from, the declaration.

DEBT on a bond in the penal sum of 12,000*l.* The condition was set out in the declaration, and recited that the plaintiffs had, on the day and year aforesaid, lent and advanced unto the therein above-bounden defendant the sum of 6000*l.*; and that by indentures of lease and release, the lease bearing date the day next before the day of the date of the release, and the release bearing or intended to bear even date with the said writing obligatory, and made or expressed to be made between the defendant of the one part, and the plaintiffs of the other part, the defendant had appointed, granted and released, or otherwise assured certain messuages, farms, lands, tenements, and hereditaments in the said release particularly described, unto the said plaintiffs, their heirs and assigns, for ever, for securing the said sum of 6000*l.* and interest, but subject to a proviso for redemption of the same premises on payment by the defendant, his heirs, executors, administrators, or assigns, unto the plaintiffs, their executors, administrators, or assigns, of the said sum of 6000*l.* and interest, after the rate in the said release mentioned, on the 13th day of *November* then next ensuing the date thereof. And in which said condition it was further recited, that for the better securing the payment of the same sum and interest unto the plaintiffs, the defendant had agreed to enter into the therein above-written obligation, with such condition for making void the same as thereinafter was contained. And the condition of the said writing obligatory was declared to be such, that if the therein bounden defendant, his heirs, executors, administrators, or assigns, did and should well and truly pay or cause to be paid unto the

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plaintiffs, their executors, administrators, or assigns the full and just sum of 6000*l.* of lawful money of *Great Britain*, with interest thenceforth for the same, after the rate of 5*l.* for every 100*l.* by the year, on the 13th day of *November* next ensuing the date of the said writing obligatory (being the same day and time as were covenanted in or by the said in part recited indenture of release for payment of the same,) but subject to such proviso for the abatement of the interest as in such indenture of release was contained, and did and should make the said payment without any deduction or abatement for or by reason of any taxes, charges, assessments, impositions, cause, matter or thing whatsoever and according to the true intent and meaning of the proviso and covenant in the said in part recited indenture of release contained, then the therein above written obligation should be void, but otherwise should remain in full force and effect, as by the said writing obligatory and the condition thereof will more fully and at large appear. After stating the proviso for abatement of interest, the declaration alleged the breach, that the defendant did not well and truly pay or cause to be paid unto the plaintiffs, or either of them the said sum of 6000*l.* or any part thereof, on the said 13th day of *November* 1831, but therein made default and by reason of the said breach of the said condition the said writing obligatory became forfeited, and thereby an action hath accrued to the plaintiffs to demand from the defendant the said sum of 12,000*l.* above demanded: Yet, &c. Plea, that he the defendant did pay unto the plaintiffs the full and just sum of 6000*l.* of lawful money of *Great Britain*, with interest for the same, from the date of the said writing obligatory until the day next hereinafter mentioned, after the rate of 5*l.* for every 100*l.* by the year, on the said 13th day of *November* next ensuing the date of the said

writing obligatory, and which was in the year of our Lord 1831, which said sum of 6000*l.* with interest, as in this plea aforesaid, then amounted to a large sum of money, to wit, the sum of 6300*l.* of like money, and that he the defendant then made the said payment without any deduction or abatement for or by reason of any taxes, charges, assessments, impositions, cause, matter or thing whatsoever, and according to the true intent and meaning of the proviso and covenant in the said indenture in the said condition in part recited contained, according to the form, tenor, and effect of the said condition under the said writing obligatory written, as in the said declaration is mentioned: concluding to the country, &c.

Demurrer, showing for cause that the said plea offers to put in issue and to affirm a matter not denied by the plaintiff, namely, the payment of interest to 13th *November* 1831, on the said bond in the declaration mentioned; whereas the declaration admits the payment of the interest in the said plea mentioned, and states only the non-payment of the principal sum; and the plaintiff, therefore, cannot safely join issue on the said plea, and for that by offering to put in issue the payment of interest which is admitted, it tenders an immaterial issue, and the traverse is thereby too large, and the said plea is otherwise informal. Joinder in demurrer.

J. Jervis supported the demurrer. The traverse is too large for putting in issue a matter not alleged in the declaration, viz. the non-payment of interest. Mr. Serjt. *Williams* states the rule of pleading on this subject in a note to *Rex* v. *Kilderby* (*a*). "A traverse must be taken of some allegation contained in the

(*a*) 1 Saund. 312 *d*, notis. See Com. Dig. tit. Pleader, (G 1—13.)

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adverse pleading, and a plea cannot conclude with traverse of what has not been before alleged or necessarily implied, though it may affect the merits of the case." The plaintiff could not have taken issue without being guilty of a departure. The plea is also bad on general demurrer, for not concluding with a verification. The Court here called on

Cowling to support the plea. As to the last point the conclusion to the country is proper, for as the plea affirms what is denied in the declaration, it raises a complete issue; *Skinner* v. *Kilby* (*a*). [*Parke* B. answers the declaration and something else.] That is the objection to the substance; but if the declaration amounts to a denial of the payment of interest, the plea introduces no new matter, and is good. If the breach is incorrect in not denying the payment of the interest as well as the principal, and without the deduction for taxes according to the terms of the condition, as previously set out by the declaration, error of the plaintiffs in that respect could make it necessary for the defendant to answer the whole of the plaintiff's real demand, as appearing from the condition set out in the declaration itself. Now that is a demand of interest as well as principal. [*Parke* B. A plea that the principal sum of 6000*l.* was paid to the defendant on 13th *November*, would have been sufficient, for non-payment of the principal is the only breach alleged, and the plea should have been confined accordingly. The effect of the breach is to admit the payment of the interest.] May not the defendant plead to the breach as if it had been properly assigned? At all events the plaintiffs might have still gone to trial on the common similiter.

Lord ABINGER C. B.—I was at first inclined to think that as the declaration admitted the interest

(*a*) Carthew, 87; and see 1 Saund. R. 337: Com. Dig. Pleader,

have been paid, the plea was not incorrect; but I yield to the opinion of my brothers, that our judgment must be for the plaintiff. The rule of law against raising unnecessary issues must be strictly adhered to, in order to prevent parties from being embarrassed as to the points they must come prepared to try. The objection being on special demurrer must prevail, though the plaintiffs, by adopting that course, have thrown an impediment in the way of their own recovery at an earlier period.

PARKE B.—The plaintiffs might have safely taken issue and proceeded in this action; but they have chosen to demur specially to the plea; and I am of opinion that their objection must prevail. This is an action on a bond conditioned for the payment of a principal sum of 6000*l.* and interest. The plaintiffs, had they so pleased, might have declared on the bond only without assigning breaches; in which case a plea like the present, showing the condition of the bond, pleading payment according to the terms of that condition, and concluding with a verification, would have been perfectly correct. But instead of declaring generally on the bond, the plaintiffs have chosen to set out the condition in their declaration, and there to assign a breach of one part of the condition only, viz. the non-payment of the principal sum of 6000*l.*, omitting to mention the interest. For the purposes of this action, then, no other breach of the condition appears. Then is this plea, as concluding to the country, a proper answer to the plaintiffs' demand? It ought to have only embraced matters affirmatively or negatively stated in the previous pleadings on the other side, without including any thing else. That being the principle upon which the plea ought to have been constructed, what is the present plea? It pro-

between the defendant of the one part and the plaintiff of the other part, the defendant did agree to sell to the plaintiff, and the plaintiff did agree to purchase of the defendant, all the naptha that the defendant might make from the 1st day of *June* then next, for and during the term of two years, say from 1000 to 1200 gallons per month, proof strength *Sykes*'s hydrometer, at the rate of *2s. 6d.* per gallon imperial measure, to advance *2d.* per gallon on every number above proof strength, and to allow in the same proportion for all that might be delivered under proof, to be delivered at *Newport*, and packages to be returned: payment by acceptance at two months after date, allowing 2½ per cent. discount, or if in cash, 5 per cent. discount, from the 14th day of every month, for the quantity delivered in the month preceding. And it was thereby then also agreed, that should the plaintiff be desirous of dissolving the said contract before the expiration of the said term, he should be at liberty so to do on his giving the defendant three months' notice in writing; and the said agreement being so made, afterwards, on &c., in consideration thereof, [mutual promises to perform the said agreement]; and the plaintiff says, that although the defendant did after the time of making the said agreement, at various times from 1st *June* 1832, to 1st *April* 1833, duly sell and deliver to the plaintiff certain quantities, to wit, 3000 gallons of the said naptha, and although the plaintiff did from time to time, during the period last aforesaid, duly purchase and accept of the defendant the said last-mentioned quantity of naptha, at the prices, and pay for the same in manner and at the time in the agreement in that behalf provided, and did from time to time, during the same period, duly return the packages in the said agreement mentioned to the defendant, and did in all other things perform the said agreement on his part; and although the quantities of

amounts to a much greater quantity than the
gallons, to wit, to 10,000 gallons at the least;
though a reasonable time for the sale and deli
the residue, to wit, 7000 gallons of the said la
tioned quantity of naptha has long since elapse
the plaintiff was always, after the making of th
agreement from the 1st *June* 1832, during the
last aforesaid, and within a reasonable time af
expiration of each month of the said last-men
period, ready and willing to have purchased a
ceived of the defendant the residue of all th
naptha that the defendant might make, at the
1000 to 1200 gallons per month, at the prices
said agreement in that behalf specified, and t
duly returned the packages of the said napth
time to time, as in the said agreement is also men
and to have paid for the said naptha in the
and at the time in the said agreement also men
whereof the defendant then had notice: Yet t
fendant not regarding the said agreement and h
promise, or either of them, did not at any time
the period last aforesaid deliver, nor hath he h
delivered to the plaintiff, at *Newport* or elsewhe
greater quantity of the said 10,000 gallons than t
3000 gallons of the said naptha, and the
thereof, to wit, 7000 gallons, was and is wholly
and undelivered by the defendant to the pl

said residue of the said naptha, and selling the same at much advanced prices.

First plea. As to the first and second (a) counts of the declaration, that before and at the time of making the said agreements respectively, the defendant was a manufacturer of acetate of lime, and carried on the trade and business of such manufacturer, to wit, in &c., and at the said times respectively the defendant intended and expected to continue, and it was expected by the plaintiff that the defendant would continue to carry on such trade and business for the periods of time to which the said agreements respectively referred, in the manner in which he was at the said times carrying it on; and by the course of such manufacture as so carried on and expected to be carried on, naptha was and was expected and intended to be made and produced, not as the principal object of such manufacture, but as incidental to the manufacture of acetate of lime, the quantity of naptha so produced being limited by the quantity of acetate of lime which the defendant might have occasion to make in his said business, and that it was not then and there intended or expected that the defendant should, during any part of the said periods of time, make any naptha otherwise than as aforesaid; of all which premises the plaintiff at the said times respectively had notice; and the defendant avers, that the said agreement was made of and concerning such naptha so expected to be produced in such trade and business, and that the plaintiff and defendant meant and intended by the said first-mentioned agreement, that the defendant should sell and the plaintiff buy all such naptha to be made in such trade and business and no more, but that the plaintiff should not be compellable to receive or pay for more naptha than from 1000 to

(a) The second count much resembled the first, and became immaterial.

said agreement mentioned, the said quantities o
in the said declaration in that behalf mention
that the same was all the naptha made by the
ant in his said trade and business, and that the
ant did not during the said periods make any
other naptha than what he so delivered. Veri

Second plea. That before the time of the
delivery of the said quantities of naptha in the
claration mentioned to have been sold and delit
the defendant to the plaintiff respectively, it wa
by and between them, that such quantities of
should be accepted and received by the plain
sold and delivered by the defendant, instead
quantities mentioned and agreed by the said fi
tioned agreement to be bought and sold, and
same were, under such agreements so made in
half, bought and sold, delivered and receive
satisfaction of such quantities in such first-m
agreement. Verification.

Third plea. As to the first count, that a
making of the said agreement in that count me
and after the whole of the supposed causes o
therein mentioned had accrued, and during t
term of two years therein specified, to wit,
March 1833, in consideration that the defendan
plaintiff's request, would agree with the pla

then promised the defendant to forego all claim in respect of such last-mentioned causes of action and the plaintiff's damages on occasion thereof, and to accept such agreement in full satisfaction and discharge of such last-mentioned cause of action and damages; and the defendant avers, that he did accordingly then agree with the plaintiff to reduce the price of the said naptha to be sold by the defendant to the plaintiff under the said agreement in the first count mentioned, from the 1st *April* 1833, until the expiration of the said term of two years, at the rate of 2*s.* 4*d.* per gallon, at proof per *Sykes's* hydrometer, and reduced such price accordingly upon the terms aforesaid, and the defendant then accepted such agreement in full satisfaction and discharge of the said cause of action in the said first count mentioned, and all the plaintiff's damages on occasion thereof. Verification.

The last plea took issue, that there was not any consideration for the said supposed agreement and promise of the defendant in the second count mentioned.

Demurrer, assigning, as to the first plea, the special causes, that the defendant offered to put in issue as matter of fact, the construction of an agreement which was matter of law; that the plea amounted to the general issue, and offered to put in issue matters irrelevant and immaterial, and that it was double.

As to the second plea, that the agreement stated ought to have been shewn to be in writing, that there was no consideration for such agreement, and that the delivery of a smaller quantity could not be a satisfaction for the non-delivery of a greater quantity.

As to the third plea, that the agreement there stated should have appeared to be in writing and signed by the party chargeable, and that the plea was double.

As to the last plea, that it did not confess and avoid or deny the matters in the second count, but referred

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to it as the *supposed* agreement; that it was doubtful to which of the agreements mentioned in the second count the plea was pleaded; that it was repugnant and ought to have concluded with a verification, so that it was double. Joinder.

W. H. Watson for the plaintiff. The construction of the agreement "to purchase from the defendant all the naptha he may make during the term of two years, say from 1000 to 1200 gallons per month," is for the court, *Cross* v. *Eglin* (*a*); but the defendant, by averring in his first plea that the quantity of it was to be limited by the quantity of acetate of lime he should manufacture, has attempted to introduce extrinsic evidence in explanation, which would give it a construction quite different from the contract stated in the declaration. The first agreement must be taken to be in writing, being within the statute of frauds 29 *Car.* 2. c. 3. Then it could not be varied by unwritten evidence, this not being the case of a particular course of trade, or of the peculiar mercantile sense acquired by certain words. Besides, that part of the plea which seeks to put a different construction on the contract laid in the declaration, amounts to the general issue. [*Parke* B. was understood to assent.]

The second plea is bad, because, as the first agreement must be taken to be in writing within the statute of frauds, it could not even before breach be waived by a subsequent unwritten agreement, though if the first had been a written contract not affected by the statute it might have been so waived, *Goss* v. *Nugent* (*b*). Now the plea admits, that the subsequent agreement relied on by the defendant was oral; for had it been in writing, it was incumbent on him to have stated it in his

(*a*) 2 Bar. & Adol. 106. (*b*) 5 Bar. & Adol. 58.

plea; *Case* v. *Barber* (a). Besides, this plea only makes out an accord, for the satisfaction which it professes to show is not reasonable, on the principle acted on in *Fitch* v. *Sutton* (b), viz. that a plea of acceptance of a smaller sum in lieu of a larger is bad.

The first objection to the second plea also applies to the third plea; nor does it sufficiently confess the cause of action which it seeks to avoid, for it states them as "supposed" causes of action. *Gould* v. *Lasbury* (c) is in point, where it was held, on special demurrer, that a plea of discharge under an insolvent act from the causes of action in the declaration mentioned "if any," was bad, for not sufficiently confessing the breach which it professed to answer by the subsequent matter of discharge. [*Parke* B. It does not appear to me that the word "supposed" is open to the same objection. That word is so used in the uniform course of pleading (d), except in abatement, which plea stands on a particular ground. The reason of its original introduction, was to avoid a seeming incongruity, where the general issue was pleaded at the same time with special pleas.

The last plea, in denying the consideration, denies the existence of any contract between the parties. It is therefore bad, as amounting to the general issue.

Maule for the defendant having intimated that he was entitled to judgment for defects in the declaration,

W. H. Watson proceeded to support it. In order to decide whether this declaration is good, the proper construction of the agreement must be considered. It is contended by the plaintiff to mean, that the defendant

(a) T. Raym. 450; *S. C.* Sir T. Jones, 158. Com. Dig. Action on Assumpsit, (F 3); 1 Saund. 211 *b.* n. 276 *a.*

(b) 5 East, 230. (c) *Ante*, Vol. IV. 863.

(d) See per Lord *Lyndhurst* C. B., in *Gould* v. *Lasbury*, *ante*, Vol. IV. 865.

business in such a manner as to enable him
contract with the plaintiff, was answered in the
He then asked, whether the declaration alle
the naptha made by the defendant had not be
whether the plaintiff could contend that th
was broken, if, at the end of two years, th
had been under the necessity of altogeth
his trade of making acetate of lime, for ade
which he could not control and against h
though short of an act of God?] It is he
to say, that a voluntary abandonment of t
before the expiration of the two years w
actionable breach of the agreement. *Lord*
v. *Gilbert* (*a*) applies; there a tenant cove
he would at all times and seasons of burnin
ply the lessor and his tenants with lime at a
for improving their lands, &c. This was
court to be an implied covenant to burn lim
seasons. [Lord *Abinger* C. B. That d
ceeded on the whole context as well as
themselves. That is the proper mode to fi
ing of particular words. But what is th
agreement to show an obligation on the d
continue his manufactory for the full term o
or to supply, at all events, a quantity an
about 1000 or 1200 gallons per month? S

ant's naptha, and would not take that of any one else. In *Cross* v. *Eglin* (a), the contract for purchase of "*about* 300 quarters, more or less," of foreign rye, did not include the whole cargo, some wheat being also brought to the plaintiffs by the same ship. Now this contract is only to deliver all the naptha the defendant might make, be it more or less. *Alderson* B. What does "say" mean, standing alone on the record, without its legal effect or actual meaning being also stated there? In *Cross* v. *Eglin* the only counts were the money counts, so that all the difficulty arose on the evidence.] In *Smith* v. *Wilson* (b), an allegation on a record of 1000 rabbits, was satisfied by proof of the custom of the country, that 1000 rabbits meant 1200, without an averment to that effect on the record.

Maule contrà, was understood to give up the objection to the second count, and was stopped by the court.

Lord ABINGER C. B.—There is no occasion to inquire whether the pleas can be sustained or not; for the preliminary question is, whether the declaration is good? The contract there stated is, that the defendant agreed to sell and the plaintiff to purchase all the naptha which the defendant might make from the first day of *June* then next, for and during the term of two years, "say, from 1000 to 1200 gallons per month." In declaring on this contract, the plaintiff states, that although he has received 3000 gallons, the defendant ought, under the agreement, to have made naptha at the rate of from 1000 to 1200 gallons per month, which would have amounted to a much larger quantity than the 3000 gallons, that is to say, 10,000 gallons; and he

(a) 2 B. & Adol. 106. (b) 3 B. & Adol. 728.

port. Thus, by custom, the word "average" quired the sense of "partial," though in its sense it has an opposite signification. There a berless other instances in which the meaning cantile contracts has been made matter of e In the present case, however, we can only cons agreement from the bare words employed, the no averments in the declaration to give a d construction to them. The agreement there la the face of it uncertain, being simply this, t plaintiff undertakes to accept all the naptha wh defendant may happen to manufacture with period of two years. The words, "say from 1200 gallons," are not rendered certain by an ment that the defendant undertook at all eve the quantity manufactured should amount to so If by fraud the defendant manufactured less t ought to have done, the breach should have s accordingly. Had he represented that the q would be from 1000 to 1200 gallons, knowing h make 500 only, the action would be for false re tation. Here it is not alleged, that in the o course of his manufacture the defendant ou have produced a larger quantity than he ha Then we cannot say that he has broken his c A distinct breach of contract should be stated

shown it to be intended as a sort of warranty or representation, that the probable amount which might be expected to be produced, in case no extraordinary accident should occur to prevent it, would be about 1000 to 1200 gallons. I am of opinion that the defendant's contract was in reality this, "I undertake to sell to you, the plaintiff, all the naptha I may make in my works during the next two years." But the statement, that the naptha so produced might probably amount in quantity to 1000 or 1200 gallons per month, is no part of the real contract, which was only for the sale of all the naptha that the works might reasonably make. Consistently with the breach assigned in the declaration, the works might be wholly incapable of producing more than the quantity actually delivered.

PARKE, BOLLAND, and ALDERSON Bs. concurred.

Judgment for the defendant (a).

(a) As to the word "say," when applied to quantity of an article sold, &c., see 2 Taunt. 211, *Phillips* v. *Astling*; *Warrington* v. *Furber*, 8 East, 245.

DOE on the demise of JOSEPH ASHBY and Others *against* BAINES.

EJECTMENT for a house and land at *Laverton* in *Yorkshire*. The following case was stated for the opinion of this court by order of a baron, pursuant to 3 & 4 *Will.* 4. c. 42. s. 25.

A testator, after directing his debts and funeral expenses to be paid by his "executrix hereinafter named," bequeathed to his heir-at-law 100*l.*; and then gave to his daughter, whom he made sole executrix, all and singular his lands, tenements, and hereditaments "by her freely to be possessed and enjoyed:" Held, that the daughter took only a life estate.

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Thomas Ashby being seised in fee-simple of the pa mises mentioned in the declaration, made his last w and testament, which was duly signed and attested as to pass real estates, in the following words:—

"In the name of God, Amen. I, *Thomas Ashby Belforth*, in the township of *Laverton*, in the parish o *Kirby-Malyeard*, in the county of *York*, yeoman, bein of sound and disposing mind and memory, do make and ordain this my last will and testament in manner and form following; that is to say, I will that all my just debts and funeral charges be paid and discharged by my *executrix hereinafter named*. I give and bequeath unto *Thomas Ashby*, my son, the sum of 100*l.* to be paid six months after my funeral; but that if my son *Thomas* should die before my death, or before he receives his legacy, then his wife and children shall re ceive it share and share alike, that is, equally divide amongst them. I give to *Mary Beckwith* one guine to be paid six months after my death. Also I give my beloved daughter *Elizabeth Simpson*, whom likewise constitute, make, and ordain the sole exec trix of this my last will and testament, *all and singula my lands, tenements, and messuages by her freely to i possessed and enjoyed;* and I do hereby utterly di allow, revoke, and disannul, all and every other form testaments and wills by me in any way before name and willed and bequeathed, ratifying and confirmin this, and no other, to be my last will and testament. witness whereof I have hereunto set my hand and se this 24th day of *January* 1800."

The testator shortly after died seised as aforesa leaving *Thomas Ashby* his only son, and his daugh *Elizabeth Simpson*, him surviving. The will was prov by *Elizabeth Simpson* executrix therein named on *February* 1800. The personal property of the testa consisted of goods appraised at the sum of 11*l.* 4*s.*, a

of a sum of 100*l.* at interest in the hands of a neighbour, which, after the testator's decease, was received by his executrix. The legacy of 100*l.* was paid by the executrix to the testator's son *Thomas Ashby*, who signed the following receipt:—

"Received by me *Thomas Ashby*, of *Bishop-Monkton*, in the county of *York*, yeoman, of *Elizabeth Simpson*, the wife of *John Simpson*, and sole executrix named in and by the last will and testament of *Thomas Ashby*, late of *Belforth*, in the township of *Laverton*, in the parish of *Kirkby-Malyeard*, in the county of *York*, yeoman, my late deceased father, the sum of 100*l.*, being a legacy left to me by the said last will and testament of the said *Thomas Ashby* deceased, bearing date on or about the 24th *January* 1800; and of and from the payment of the said 100*l.*, I do hereby for ever acquit, release, and discharge the said *Elizabeth Simpson*, and the said *John Simpson* her husband, and each of them, their and each of their heirs, executors, and administrators, and his, her, and their goods and chattels, lands and tenements, and particularly the lands, tenements, and hereditaments, late the estate and inheritance of the said *Thomas Ashby* deceased. As witness my hand, this 22d day of *July* 1800. Witness, *George Wharton*. *Thomas Ashby*, + his mark."

Elizabeth Simpson survived her husband, and died in 1829 in possession of the premises, leaving *Mark Simpson* her eldest son and heir-at-law, who is still living. *Joseph Ashby*, a lessor of the plaintiff in this action, is the eldest son of *Thomas Ashby* now deceased, who died intestate, and was the only son and heir-at-law of *Thomas Ashby*, the testator above-named.

The question for the opinion of the court is, Whether or not *Joseph Ashby*, one of the lessors of the plaintiff, is, under the circumstances above stated, now entitled to recover the premises in question in this ac-

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tion of ejectment. If the court shall be of opinio he is so entitled, judgment is to be entered fo plaintiff by confession, with 1*s*. damages and co be taxed. If the court shall be of a contrary op then judgment is to be entered for the defendant

John Henderson for the lessor of the plaintiff stopped by the court, who called on

Tomlinson for the defendant. The testator's d ter, *Elizabeth Simpson*, under whom the defe claims, took an estate in fee. Though the mere the latter words, "by her freely to be possesse enjoyed," does not of itself show the testator's inte to confer a fee, *Goodright* d. *Drewry* v. *Barre* yet *Loveacres* v. *Blight* (*b*) shows that those w under special surrounding circumstances, may the fee. In *Loveacres* v. *Blight* the testator ch his real property with the payment of an annuity wife, and then devised it to his executors "freely possessed and enjoyed." Lord *Mansfield* said, *freely* was a material word, for that the testator h charged his estate with the payment of the annu his wife, &c., could not mean by the word *free* give it free of incumbrances; the *free enjoyment*, fore, must mean free from all limitations, *i. e.*, the lute property of the estate. So here, the devi *Elizabeth Simpson* of the testator's lands, "by freely to be possessed and enjoyed," after bequea a legacy to his heir-at-law, shows that he was n tended to take the reversion. [Lord *Abinger* Probability that the testator intended to disinher heir-at-law, is not sufficient to do so.] The testator d his debts and funeral expenses to be paid by his *exe thereinafter named*. [Lord *Abinger* C. B. That c

(*a*) 11 East, 220. (*b*) Cowp. 352.

on her is implied by the making her executrix.] These are not words of general direction to executors to pay a charge on the personal estate, but are special, operating as a sort of designatio personæ, imposing the charge on *Elizabeth Simpson* as an individual, and not in her representative capacity. See the judgment of *Blackstone* J., in *Goodright* d. *Phipps* v. *Allen* (*a*). [Lord *Abinger* C. B. If land be given by will to *A.*, charged in his hands with an annuity to be paid to *B.*, it is a reasonable presumption that he meant *A.*'s estate to be a fee, or the charge would fail if *A.* should die before *B.*]

Lord ABINGER C. B.—The courts, when called on to construe a will, endeavour anxiously to discover the testator's intention, but do not proceed to a conclusion respecting it on mere conjecture or guess. Looking at the whole context of this will, nothing appears to show any intention of the testator to disinherit his heir-at-law, or to give more than a life estate to his daughter *Elizabeth Simpson*. No claim in the will imposes any such condition on her as would require a larger estate to vest in her, nor are the words, "all and singular my lands, tenements, and hereditaments," equivalent to the expression "all my *estate*" (*b*), so as to carry a fee; and the subjoined words, "freely to be possessed and enjoyed," taken alone, are clearly insufficient to do so.

BOLLAND B.—In *Goodright* d. *Phipps* v. *Allen*, *De Grey* C. J. puts his judgment on the ground now taken by this court. "The annuity is given to *Ramsay* for her natural life to be paid by the executor, which, being of an uncertain duration, must have a fee to support it." That is the real foundation for that decision. In this case no such reason exists. The description of the

(a) W. Bla. 1041.

(b) See cases collected, 6 Cruise Dig. tit. Devise, ch. x. 191, 3d edit.

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Doe d. Ashby v. Baines.

property itself, and the mode of its enjoyment, are bo insufficient to pass a fee. And the only charge her contended for is a charge for funeral expenses, whic the executrix was, as such, at all events bound to pay

Alderson B.—I am of the same opinion. Befor the defendant can succeed against the general rule c law, we must see that by the will the testator meant t go beyond a gift of an estate for life to *Elizabe Simpson*; but that does not appear.

Judgment for the lessor of the plaintiff.

In the matter of the Estate and Effects of John Evans, deceased.

Real estate was devised to trustees for the benefit of several parties for life, and after their deaths to be distributed among their children and others. The devisor added this direction, "it shall be *lawful* for the trustees to sell the same, or any part thereof, as shall appear most expedient to any trustee or trustees for the time being, towards the management of my property and affairs."

A part was sold by the trustees soon after the death of the devisor, it being ad tageous so to sell it for building, and the rest was sold ten years after by order c court of equity. Held, that neither sale was of property *directed* to be sold by t testator, within the meaning of 55 *G*. 3. c. 184, schedule, part 3, and therefore th no stamp duty was payable.

A RULE had been obtained for the attorney-gen ral, under 42 *G*. 3. c. 99. s. 2. calling upon *Geor Batley*, the executor of the will of *J. Evans*, decease and trustee under it for the sale of certain freeho and copyhold estates, to show cause why he shou not render an account of the legacy duties payab under such will, and why the same should not be pa &c. The affidavit stated the deponent's belief th *Batley* had sold the testator's estates under the will, a part thereof.

The affidavits disclosed, that *J. Evans*, by his w dated 4 *August* 1818, duly executed and attested after bequeathing certain pecuniary legacies and an ties, directed, that if his just debts and funeral

penses, and all the legacies and annuities thereby given, could not be satisfied out of his personal estate, exclusive of his leasehold property, particularly charged his leasehold estates in *Southwark* with the payment of the deficiency, and by his said will gave, devised, and bequeathed all and singular his freehold, copyhold, and leasehold estates situate and being in *Kent*, *Surrey*, and *Essex*, or elsewhere, and all his personal estate soever, subject to the payment of his debts and legacies, unto his sister *Mary Batley*, (who died in testator's lifetime,) and his brother *George Evans*, (who also died in the testator's lifetime,) and his brother *George Evans*, also since deceased, and *Fisher Evans*, their heirs, executors, administrators, and assigns, according to the nature thereof respectively, upon the trusts, intents, and purposes thereinafter mentioned; that is to say, as to one third part or share of such residuary estate devised and bequeathed as aforesaid, the said testator willed that the said trustees, and their heirs, executors, and administrators, should stand seised and possessed of it, in trust to pay the rents, interest, dividends, and produce of such third, as the same should accrue, to his sister *Mary Batley*, during her life, for her separate use; and after his decease, the said testator gave and devised such third part of his residuary property unto the children of the said *Mary Batley* living at his death, equally to be divided among them, as tenants in common, and their respective heirs, executors, administrators, and assigns; or should any of the then present five children of the said *Mary Batley* die in his, the said testator's, lifetime, leaving any issue living at his, the said testator's, decease, such issue should be entitled to the same share as the deceased parent might have claimed if living at his, the said testator's, death. The will gave power to *B. Batley*, the husband of *Mary Batley*, by writing under his hand or last will,

ceased parent might have claimed if living at the time of his, the said testator's, death; and if any child of the said *G. Evans* living at his, the said testator's, death, should die under twenty-one years without issue, his or her part or share should go to the survivor or survivors in equal shares, if more than one, as tenants in common; and the said testator also expressly declared, that notwithstanding any thing thereinafter contained, or any event which might happen, it should be lawful for the said *G. Evans*, at any time or times during his life, after satisfying any debt due from him to his, the said testator's estate, by any writing or writings under his hand, attested by two or more credible witnesses, to require and direct the trustees and executors for the time being of the said will, by sale or mortgage, or otherwise, as should appear expedient, to raise or advance, or apply any sum or sums of money, or make over any property for the advancement or preferment in life, or on the marriage of any of his children, so as the same did not exceed, for any one such child, the value of the share which such child would be entitled to upon the death of the said *G. Evans* as aforesaid: and the testator thereby authorized and empowered the trustees or trustee for the time being, after the decease of the said *G. Evans*, and during the minority of any of his children, to pay and apply the rents, interests, and annual profits of the presumptive shares of such children respectively, towards their maintenance and education, or to raise and apply any part of the principal for the advancement of any child in the world.

And as to the remaining other third part or share of his residuary property, the testator gave and devised the same as therein mentioned, for the benefit of his brother *Fisher Evans;* but considering that he, the said *F. Evans*, had received from him, the testator, considerable advances and assistance beyond what he

mentioned third share of his residuary prop
sum of 1000*l.*, or the value thereof, to be adde
applicable in the same manner as the third
his property thereinbefore devised and bequea
the benefit of the said *M. Batley* and her fam
also to raise and set apart the like sum of 1
the value thereof, to be added to and applicab
same manner as the third share left for the b
the said *G. Evans* and his family; and subjec
chargeable with the payment of such two sums
each for the purposes aforesaid, the testator
that during the life of the said *F. Evans* he be
rents and produce of the surplus of such last-m
third share of his residuary property, or
thereof as he should require towards his sup
maintenance, in such manner as he should think
and that the said trustees should lay out an
what should not be so received by him, the
Evans, upon any of the public funds or real
to accumulate: and in the said will was con
power for the said trustees and executors, a
quest of the said *F. Evans*, testified as ther
tioned, to raise by mortgage or sale, or other di
of the said last-mentioned undivided third pa

sons, and for such intents and purposes as he, the said *F. Evans*, should in that behalf from time to time direct by writing, as therein mentioned: and in consideration of the deduction thereby made from the share of the said *F. Evans*, the said testator released him from any debt which might be due from him to the said testator at the time of his, the testator's, death: and upon the decease of the said *F. Evans*, the said testator declared that in case he should leave any widow, such widow should be entitled to enjoy, for her separate use during her life, the rents, interest, and produce of such share of his residuary property as the said *F. Evans* should be in the receipt of at the time of his, the said *F. Evans*'s, death; and should the said *F. Evans* have any children, then after the death of the said *F. Evans*, and any widow he might leave, the said testator gave and devised such last-mentioned third part, or so much thereof as should not otherwise be disposed of under the powers thereinbefore contained, and all accumulations, if any, arising therefrom, and all future benefit thereof, unto all the children of the said *F. Evans*, at their respective ages of twenty-one years, subject to the same powers for applying the rents, interest, dividends, and produce, for maintenance and education, and such advances out of the principal of any share for preferment in the world during minority, as thereinbefore given respecting the shares of the said *M. Batley* and *G. Evans* respectively; but in case the said *F. Evans* should not have any children who should live to become entitled to his share of his, the said testator's, residuary property as aforesaid, the said testator gave and devised the same unto all the children of his said sister *M. Batley* and his brothers *G. Evans* and *Perceval Evans*, who should be living at his, the said testator's, decease, in such parts, shares, and proportions, and to be vested at such ages, days, or times,

And in the said will was contained a power in the words following: that is to say,

Provided also, and I do hereby further declare and direct, that, notwithstanding any of the trusts and directions hereinbefore contained touching my freehold and copyhold estates, it shall be lawful for the trustees or trustee thereof for the time being, to sell the same, or any part thereof, by public sale or private contract, either together or in parcels, or make or agree to any exchange or partition thereof, either together or in parcels, or of any part thereof, as shall appear most expedient to my trustees or trustee for the time being, towards effecting the arrangement of my property and affairs.

And I do declare that neither of them shall, on account of the trusteeship, be precluded from becoming a purchaser of any part of my property by public sale or private contract, or in exchange, with the consent in writing of the other parties beneficially interested therein, and competent to consent thereto; and I particularly direct that my brother *G. Evans*, if living and resident in his present house at *Balham*, at the time of my decease, shall have the option of purchasing my lands, adjoining the fields belonging to the said house, at a price to be fixed upon the same by two competent persons, one of whom shall be nominated by him for the purpose within two months after my decease, and the other by my other trustees for the time being, with power for the two persons so appointed to name an umpire; and I further declare, that upon paying to the trustees or trustee of this my will for the time being, the price or consideration for the purchase or exchange of any part of my freehold, copyhold, or leasehold estate, or other property so sold or exchanged, such trustees or trustee shall thereupon convey, surrender, or assign the same respectively unto or

themselves respectively and their respective children, and with such powers over the same as therein mentioned, and appointed them executors of his said will; the said testator did, by the codicil now in recital, appoint in their stead *John Richard Baker*, of *Bedford Place*, and his nephew *G. Batley*, son of the said *M. Batley*, to be trustees and executors thereof, upon the same trusts, and for the same persons, intents, and purposes as mentioned in his said will, and did thereby give and devise his said estates and property to the said *J. R. Baker* and *G. Batley* accordingly.

The said testator departed this life on or about the 23d *January* 1823, without altering or revoking his said will, save as appears by the said codicils, and without revoking the said codicils, save as appears thereby; and the said will, together with the said three several codicils thereto, were duly proved by the said *G. Batley* alone, in the Prerogative Court of the Archbishop of *Canterbury*, on or about the 20th day of *February* in the same year, the usual power to prove the said will and codicils at a future time being reserved to the said *J. R. Baker*, if he should think proper to execute the same.

The debts, legacies, annuities, funeral and testamentary expenses of the said testator were duly paid and satisfied by the said *G. Batley* out of the said testator's personal estate; which, exclusive of and without including the value or produce of the leasehold property, was more than sufficient for the purpose.

As certain parts of the testator's real estates situate at *Balham*, in the county of *Surrey*, were considered eligible for building on, it was deemed more beneficial for the parties interested in the said testator's property, that such parts of the said real estate should be sold; and in consequence thereof the said *J. R. Baker* and *G. Batley*, by virtue of the power given to them by the

was put up to auction by Messrs. *Farebrother* & Co., auctioneers, at *Garraway's Coffee House, Cornhill*, in the city of *London*, on the 30th day of *August* last, with the approbation of *Richard Richards*, Esq., the master to whom the said cause stood referred; and at such sale certain parts of the said estates, including the timber thereon, situate in the county of *Kent*, was sold to *Thomas Pemberton*, Esq. for 20,050*l.*, and certain other parts of the said estate situate at *Dagenham*, in the county of *Essex*, including the timber thereon, were sold to *Samuel Avila*, gent. for the sum of 351*l.* 1*s.*, and such several purchases have since been duly confirmed; and the said sums of 20,050*l.* and 351*l.* 1*s.* have been paid by the said *T. Pemberton* and *S. Avila* respectively, into the Bank of *England*, in the name and with the privity of the said Accountant-General of the said court, in trust in the said cause.

The said *G. Batley* is ready and willing to render all proper accounts, and to pay the necessary duty thereon to the Commissioners of Stamps; but the said *G. Batley* is advised that no duty is payable for or in respect of the monies arising from the sale of the said real estates of the said testator, devised by his will as before mentioned; and which, since the said testator's decease, have been sold by the said *J. R. Baker* and *G. Batley*, the trustees thereof, either of their own authority, or under the order and decree of this honourable court.

Merewether Serjt. and *Follett* showed cause in *Trinity* term 1834. The question is, whether the produce of the sales of those parts of the testator's real estates which were sold for building, and of the other parts which were sold under a decree in equity, are chargeable with legacy duty under the following words of 55 *G.* 3. c. 184. " Monies to arise from the sale, mort-

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gage, or other disposition of any real or heritable estat *directed* to be sold, mortgaged, or otherwise dispose of by any will or testamentary instrument of any pe son who shall have died." The crown relies on the having been a sale in point of fact, but the executo need not contend that the word *direct* is required, order to attach the duty. But the question is, wheth or not the testator in fact meant to direct that the pr perty should be converted into money; and if it can implied from the will, that he clearly intended to ma such a direction, the duty may attach. Such his tention must however be positive, and so manifest the face of the will that a direction can be implied, if a discretion is left to the trustees or executors, or the sale depends on a contingency, that cannot be "direction to sell" within the words or meaning of t act. It will not be enough that it is difficult to ca the will into execution without a sale, nor that the t tator expected or thought that a sale would eventua be probable or necessary; for to constitute an impl *direction* within the stamp act a sale must be rende absolutely necessary, without the vesting any discret in the trustees or executors. In *The Attorney-Gene* v. *Halford* (a) there was an express direction to and though no actual sale had taken place, the c enforced the principle of equity referred to by *Thom* B., that in equity that which is directed to be d must be considered to be done. Nor is *The Advoc General* v. *Ramsay's Trustees* (b) in point for the cro The principle there established was, that where a estate is devised to form a fund for distribution, it be considered as part of the personal estate, nor c

(a) 1 Price, 426.

(b) The Reporter was favoured by the Legacy Duty Office with thi and the judgment. See it in the note at end of this case.

the court there construe the will in any other way than as containing an intention that the whole property should be converted into money; so that the direction to the trustees was imperative and not discretionary. Here the testator's intention clearly was, that the real property should remain unconverted if practicable. For the provisoes, uses, and trusts, applicable to real property only, so much predominate, that the option to the brother *George* to purchase the land at *Balham* cannot alone suffice to show an intention that the whole property should be sold; at all events no clear *direction* to sell can be predicated from the will. Such an intention will not be presumed, from the difficulty of carrying the will into effect in any other manner. No sale could be absolutely requisite, for the trust was administered for many years without one. But as there is no express "direction to sell," it cannot be implied without absolute necessity to do so.

Sir *C. C. Pepys* (Solicitor-General) *Amos* and Sir *George Grey contrà*. If monies arising from a sale under a discretionary power to sell or not, are held not subject to legacy duty, it will open a great door to evade its payment altogether. A direction to sell may be implied where the power is not to sell at all events. If it is clear from the testamentary disposition, and the circumstances of the family, as well as the nature of the property, that a sale will be necessary for the proper execution of the trusts, that constitutes an implied "direction to sell" within the stamp act. Were it otherwise only a few words would be required to evade the duty, though the rest of the will clearly showed that a sale was the object of the testator; for if the sale is advantageous to the trusts, the trustee is bound to sell. The following passage occurs in the judgment of the Court of Exchequer in *Scotland*, in *The Advocate-Ge-*

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neral v. *Ramsay's Trustees*:—"To see whether there was an option, it is necessary to attend to the price given, and to trace the leading intention in the mind of the testator; if converting into money be the fair meaning of the deed, though a power only is given, that power is imperative. In the present case it is submitted that the fair meaning of this will is, that the real property should be converted into money. The number and classes of persons to be benefited by the decision show that such was the intention; and the arrangement of the testator's property and affairs, mentioned by him in the will, could not have been effectuated without such sale. The word *directed* ought to be construed favourably to the crown, according to the well-known distinction between acts which impose a penalty on the subject, and those which grant a revenue to the crown."

Lord LYNDHURST C. B.—Every subject has a right so to shape the disposition of his property, as if possible to *avoid* the accruing of the legacy duty, and there is no fraud in so doing (*a*). According to my present opinion, it is not necessary to bring a case within the word "directed" in the act of parliament, that that word should be found in the will, but it is sufficient if the effecting a sale was the object of the will, obviously intended by the testator. That was the principle of the two cases cited in argument. The question in the present case was, whether there was such an obvious intention, and such a necessity for a sale to effectuate the purposes of the will, as that a sale could be said to be directed. No case has gone so far as to say, that the duty was payable when there was not either an express direction to sell, or a manifestation in the will of the testator's intention that there should be a sale. As this is a new case, [illegible]

(*a*) See *Attorney-Gen.* v. *Jones* and *Bartlett*, 3 Price, 383, per Wood. And see *Shepherd* v. *Hall*, 3 Camp. 180; *Holliday* v. *Atkinson*, 5 B. & C. 501.

must turn principally on the construction of the particular terms of the will, the court will take time to search through them, and consider their judgment

Cur. adv. vult.

The judgment of the court was afterwards delivered in *Easter* term 1835 by

BOLLAND B.—This case was brought before the court, on the motion of the Attorney-General, on an affidavit, filed in the above matter, by *Charles Palmer Dimond*, gentleman, solicitor for the acting executor of the last will and testament of *John Evans*, esq. deceased, late of the borough of *Southwark*.

The question for our opinion is, whether legacy duty be payable upon the monies arising from the sale of the real and copyhold estates of the testator.

It was argued before Lord *Lyndhurst*, myself, and my brothers *Alderson* and *Gurney*.

It appeared by the affidavit of Mr. *Dimond*, that the testator, after providing for the payment, out of his personal estate, of his debts, funeral expenses, and legacies, and which were afterwards duly paid, bequeathed the residue of his property, consisting, amongst other things, of freehold and copyhold estates, to trustees upon certain trusts mentioned in his will. The will contained a discretionary power of sale as to the estates comprised in the residue, and which is set out in the affidavit, but it contained no *direction* to sell.

By the 55 *Geo.* 3. c. 184. sched. part 3, the legacy duty is made payable "upon monies to arise from the sale, mortgage, or other disposition of any real estate, *directed* to be sold, mortgaged, or otherwise disposed of by any will or testamentary instrument."

Shortly after the death of the testator, the trustees, by virtue of the power, sold a part of the residuary

necessary that it should be sold for the purposes of the will, the party beneficially interested elected to take the estate in specie. The court was of opinion that although no sale had taken place, yet as the testator had expressly directed the property to be sold, the duty was payable. In the other case, which was a case before the Court of Exchequer in *Scotland* (*a*), the question turned upon the construction of the will; and the court was of opinion that, taking the whole will together, it contained a direction to sell; and upon that ground it was adjudged that the legacy duty was payable. It is obvious that these cases have no application to the present.

We are of opinion, therefore, that the claim of the Attorney-General, on the part of the crown, ought not to be allowed, and that the rule of 24th *March* 1834, be discharged, as to the proceeds of the sale of the real and copyhold estate, and made absolute as to the personal estate.

(*a*) IN THE EXCHEQUER IN SCOTLAND.

ADVOCATE-GENERAL *v.* RAMSAY'S Trustees.

INFORMATION by the Advocate-General in debt for legacy duty. A verdict was found for the crown, subject to the opinion of the Court on the following case:—

The defendants are trustees, who have accepted, and have been carrying into execution, the testamentary trust-dispositions and settlements of the deceased *Andrew Ramsay*, formerly *Andrew Balfour*, who died the 25th day of *April* 1814.

The first of the said testamentary trust-dispositions and settlements bears date the 5th day of *August* 1806, and thereby the said *Andrew Ramsay*, then *Andrew Balfour*, did give, grant, assign, and dispone to the said trustees and their assignees, in trust, for the uses and purposes therein mentioned, "All and sundry lands, tenements, houses, annual rents, and other heritages" then belonging to, or which should happen to belong to, the said *Andrew Ramsay* at the time of his death, with the rents and duties thereof, with certain specified exceptions; and did assign and convey to the said trustees, all and sundry debts, heritable and moveable, and sums of money and other moveable estate which might belong to him at the time of

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his death, with certain specified exceptions, surrogating and substituting the said trustees in his full right to the premises, under the specified exception, "with power to the said trustees, or such of them as shall accept hereof, and to the survivors or survivor of the said acceptors, or to any two of them, while two or more survive, whom I, the said *Andrew Ramsay*, hereby declare to be a quorum, immediately after my decease, to uplift and receive the whole heritable and moveable debts and sums of money the[illegible] resting and owing to me, and to intromit with my whole moveable estate [illegible]e and effects before disponed; to grant receipts, discharges, renunciations [illegible] or conveyances of the said debts, and use and dispose upon the said moveab[illegible]ble estate and effects, and in general to do every thing in relation thereun[illegible]nto which I might have done in my own lifetime; as also to establish in the[illegible]eir persons legal titles to the several lands and heritages that shall belong[illegible]g to me at my decease, excepting as aforesaid, and to sell and dispose of [illegible] the same, or any part thereof, either by public roup or private sale, as to th[illegible]hem shall seem most expedient, and to uplift and receive the rents and du[illegible]uties thereof while unsold, and the prices and proceeds thereof when sold; [illegible] and to grant dispositions, and all other writs necessary, in favour of the [illegible] purchasers, one or more binding my heirs in absolute warrandice of the [illegible] subjects sold; hereby declaring that the purchasers of my said lands and [illegible] heritages, or of any part thereof, shall have no concern with the applicatio[illegible]on of the prices of their respective purchases, but that a receipt and acquitt[illegible]tance for the same, by the said trustees, or the quorum aforesaid, shall be t[illegible]o the said purchasers a full and sufficient exoneration; with power also t[illegible]o the said trustees, or the quorum aforesaid, to appoint factors or cashiers [illegible]under them, from time to time, for uplifting and discharging the rents and [illegible]duties of my said lands and heritages, the prices of the same when sold, an[illegible]d the debts due to me, and for managing my whole real and personal or her[illegible]ritable and moveable estate hereby disponed; and for rendering these pr[illegible]esents the more effectual, I hereby nominate and appoint the trustees [illegible] before named, and the survivors or survivor of such of them as shall accept h[illegible]ereof, to be my sole executors, universal legatories, and only intromitter[illegible] with my moveable goods and effects, excepting as aforesaid, and the deb[illegible]ts due to me, exclusive of my nearest of kin, and all other persons, with [illegible]power to them, after my decease, to give inventories of the debts due and [illegible]effects belonging to me; confirm the same if necessary, and in general to do [illegible] every thing in relation thereunto, that I might have done in my own lifeti[illegible]me, or which any executors, general disponees or universal legatories may la[illegible]wfully do in like cases; but providing always as it is hereby expressly pr[illegible]vided and declared, that the said trustees shall be holden and obliged to a[illegible]ccount for and apply their whole intromissions with the trust subjects here[illegible]by disponed, and the rents, issues, and profits arising from the same, in [illegible]manner following, viz., in the *first* place, for payment of the expense of com[illegible]pleting their own titles to the said subjects, and of executing this present [illegible]rust;

secondly, for payment of the debts of the said *Andrew Ramsay*; *thirdly*, for payment of the several sums of money underwritten, which I hereby legate and bequeath to the persons after mentioned, and their respective heirs, executors, or assignees," among which are legacies of 500*l.* to each of his three nieces after mentioned, "declaring always that if the produce of my estate shall not be sufficient for paying all the above legacies, after discharging my debts and the expenses above mentioned, every legacy shall suffer an abatement in proportion to the extent thereof," with a single exception; *fourthly*, for some provisions to servants; "and, *lastly*, with regard to the residue and remainder of my whole real and personal, and heritable and moveable estate, and the value and proceeds thereof, when converted into money, after payment of the expenses, debts, and legacies before mentioned, I hereby will, appoint, and direct the said trustees, and the survivors or survivor of them, or the quorum aforesaid, to pay over such residue and remainder, if any be, and whatever it may be, or to assign the securities for the same to the said Mrs. *Elizabeth Balfour* or *Campbell*, *Anne Balfour*, her sister, and the said *Anne Ramsay Wardlaw*, my three nieces, equally among them, and their respective heirs, executors, or assignees."

Which said deed farther contains the following clause:—"And which heritable subjects before disposed, with the writs and title-deeds thereof, I bind and oblige myself, my heirs and successors, to warrant to be good and effectual, free, safe, and sure to the purchasers thereof from my said trustees, from and against all debts, burdens, incumbrances, and grounds of eviction whatsoever, at all hands, and against all deadly, as law will."

The said *Andrew Ramsay*, formerly *Andrew Balfour*, executed a supplementary trust-disposition and settlement, which bears date the 30th of *January* 1813, which bears, that upon the 5th day of *August* 1806, he had executed the aforesaid trust-disposition and settlement of his "estate, real and personal, since which time" (the said deed bears) "I have revoked some of the legacies; others have become lapsed by the death of the legatees, and, my funds having since increased, I have resolved to bequeath certain other legacies and annuities. Moreover, I have since acquired a house in *Frederick Street*, which it is proper to dispone specially to my trustees appointed by the said deed." Therefore he, the said *Andrew Ramsay*, did thereby give, grant, and dispone to and in favour of the trustees named and appointed by the said deed of settlement first above mentioned, and to a certain other trustee since deceased, "and that" (the said supplementary deed bears) "for the uses and purposes mentioned in the said former deed, which I hereby approve of in the whole heads, articles, and contents thereof," excepting in so far as the same had been, or might be revoked by writing; and to the assignees of the said trustees, all and whole, the said dwelling-house therein more particularly described, with the whole parts and pertinents, and rights and privileges thereof; and

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the said *Andrew Ramsay* did thereby direct his said trustees to pay the legacies and annuities therein mentioned.

In both of the said deeds the said *Andrew Ramsay*, formerly *Andrew Balfour*, reserved to himself power to revoke or alter the same, and the same contained declarations that the same should be effectual though remaining in his repositories undelivered at the time of his death, and that the same did remain so undelivered at the period of his death.

Part of the estate so conveyed to the said trustees by the said first-mentioned testamentary deed consisted of certain debts due to the said *Andrew Ramsay*, secured by bonds termed heritable bonds, in the usual forms of such bonds, each containing a personal obligation by the borrower to repay the sum lent to him, with interest and penalty upon a failure, and a disposition, in security thereof, of certain heritable subjects, in which subjects the said *Andrew Ramsay* was, at the time of his death, infeft in virtue of the said bonds, and which subjects were redeemable on payment of the respective debts, interests, and penalties, if incurred, in the usual manner; and that the said *Andrew Ramsay* had not used the proceedings necessary to entitle him to enter into the actual possession or management of the subjects so conveyed, but received the interest of the said debts from the persons so conveying the said heritable subjects, and who themselves continued to possess and manage the same.

At different times after the death of the said *Andrew Ramsay*, and before the first day of *January* 1821, in the course of the trust-management of the said trustees, money arising from certain of the said heritable bonds, came to the hands of the said trustees, the said trustees having obtained payment thereof, or assigned the same, or sold the same; the principal sums which so came into their hands amounting to 9606*l.* 13*s.* 4*d.* There also came to their hands, during the said period, of interest on the said heritable bonds, become due after the death of the said *Andrew Ramsay*, the sum of 1091*l.* 13*s.* 3*d.*

After the death of the said *Andrew Ramsay*, and before the said first day of *January* 1821, the said trustees, in the course of their trust management, did sell certain houses, part of the said heritable estate so conveyed to them, and did receive the prices thereof, amounting to the sum of 975*l.* 3*s.*, and did also receive the rents thereof arising after the death of the said *Andrew Ramsay*, and before the period of selling the same, amounting to the sum of 332*l.* 10*s.* 10*d.*

And the said trustees did also receive of rents become due since the death of the said *Andrew Ramsay*, and before the said first day of *January* 1821, of the third share of the lands of *Roseburn*, which belonged to the said *Andrew Ramsay*, and conveyed to them by the said testamentary disposition, amounting to the sum of 389*l.* 15*s.* 7*d.*

At the said date of 1st *January* 1821, the said trustees did satisfy or pay to the said nieces of the said *Andrew Ramsay*, to whom the said residue was

given as aforesaid, the residue of the monies in their hands arising from the said personal and moveable estate, and from the said heritable bonds and interests thereof, and the said prices of houses sold, and rents thereof, and said rents of *Roseburn*.

The said trustees paid legacy tax after the rate of three pounds for every hundred pounds of the part of the said residue which they admitted to be residue of the personal or moveable estate, but have not paid any such duty on the part thereof which they represented to be, and held to be the said principal sums and interest arising from the said heritable bonds, and prices and rents arising from the said houses sold, and said rents arising from the said lands of *Roseburn*, and the further sum of 1361*l.* 6*s.* 8*d.* of interest received by the said trustees, or due on the said principal sums of the said bonds, after the same came to their hands, up to 1st *January* 1821, and the further sum of 145*l.* 17*s.* 11*d.*, of like interest on the said before-mentioned sum of interest from the said heritable bonds, and the further sum of 35*l.* 18*s.* 7*d.* of like interest on the said prices of the said houses, and the further sum of 43*l.* 15*s.* 11*d.* of like interest on the said rents of the said houses, and the further sum of 38*l.* 12*s.* 5*d.* of like interest on the rents of the said lands of *Roseburn*, all up to 1st *January* 1821.

The estate of the said *Andrew Ramsay*, so admitted by the trustees to be personal or moveable estate, was sufficient to pay all his debts, funeral expenses, and the legacies and annuities left in his said settlement, other than the shares of residue to his said residuary legatees.

The case was argued by the *Lord Advocate* (Sir *William Rae*) and the *Solicitor-General* (Mr. *Hope*) for the crown, and by Mr. *Archibald Murray* and Mr. *John Campbell* for the trustees.

The court (*a*) took time to consider, and on *Monday, February* 3, 1823, judgment was delivered by—

The LORD CHIEF BARON.—This is an information in debt for legacy duty on the residue of the real estate given in equal shares to three nieces under the disposition of the deceased *Andrew Ramsay*, formerly *Balfour*. The defendants are trustees acting under the deed by which he settled his affairs.

[His Lordship then read the special case, as far as the clause relative to the heritable bonds inclusive. He noticed from that clause, that a question appears to be intended to be raised, whether the succession to heritable bonds is to subject the party benefited to the legacy duty.]

But the view of this case which the court have taken renders it unnecessary to consider such a question; they will dispose of the case on the pre-

(*a*) The case was heard and decided by the Lord Chief Baron (Sir *Samuel Shepherd*), Baron Clerk *Rattray*, Sir *P. Murray*, and Baron *Hume*.

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sumption that the heritable bonds were part of the real estate of the ceased. This deed disposes of the moveable and heritable estate of t testator, and the residue arises from the sale of both. There appears have been sufficient moveable estate to pay the debts and legacies; a although in many cases a sale of real estate in such circumstances woul not have been necessary, so far as duty is at present claimed, it has be been actually sold by the trustees.

The question is, whether, under the acts, this residue, which I will tak to be produced entirely from the sale of real property, is liable to legacy duty; or whether it is to stand as if the real estate had been conveyed t the trustees for the purpose of being re-conveyed to the donees.

One question has been mooted, which would go to free the whole of thi from legacy duty, namely, that the deed stated in the special case was no a testamentary instrument; that, in terms of the act, the duty on residu from real estate is only due when a residue is gifted "of monies to arise from the sale, mortgage, or other disposition of any real or heritable estate, directed to be sold, mortgaged, or otherways disposed of by any will or testamentary instrument."

It is said that, *quoad* real estate, this could not be deemed a testamentary instrument, because, according to the law of *Scotland*, one cannot dispose of real property by testament. It is admitted that this is a testament as to personal, but not as to real estate. What are the purposes of this deed? Are they not exclusively the disposal of his property after his decease? Were the argument good, residue from real estate could not be liable to this duty in any case, nor could legacies even out of land, or of money from the sale of land, be liable to it; such legacies, according to the argument, could not be given from real estate by a testamentary instrument and it is only on legacies given by a will or testamentary instrument, that duty is exigible.

But the question is, what is meant by a testamentary instrument in the statutes? Does it mean such testament as will pass lands? and becaus there is none such in *Scotland*, is there to be no duty? Or, does it mean such instrument, if sufficiently executed, which is only to begin to operate and have effect at the decease of the maker of it? Unless it means so is to be held a testamentary instrument, no residue from land, nor legacy be claimed from land, would be liable to duty, as such can only be made by some kind of deed, and it is argued that land cannot be charged by testamentary instrument. Legacy and bequest of residue are, in their nature, precisely the same, only the amount of the one is ascertained, and that of the other cannot be ascertained at the time. Both are gifts on taking effect from the death of the testator.

I apprehend the act meant, by the term testamentary instrument, writing, whatever the form, or however by law it might be required to executed, if it remains dormant during the life of the person executing

if it be revocable until his death, and if it only comes into active power at his death. Such writing stands in place of a testament, and is to be viewed as a testamentary instrument.

The deed, in the present case, the court are of opinion is testamentary; and, provided gifts have been raised pursuant to the powers of the will, by a sale under the deed, the duty will be due.

When one considers the intention of the acts, as the Lord Advocate well pointed out, it is, that every thing which comes, or is directed to come into the hands of the donee in the shape of a money gift or bequest, should pay the tax.

The argument against the duty here is, that there is said to be an alternative, and that the trustees had power either to sell or not to sell, but to distribute the residue in specie: that they had an option, and that it was not a direction. I will not say how it would be if an option merely is given. I have formed a strong opinion on that question, but do not think it necessary to state it now, because in this case, as I will proceed to show, I do not conceive the trustees had the option not to convert the real estate into money.

To see whether there was an option, it is necessary to attend to the power given, and to trace the leading intention in the mind of the testator. If converting into money be the fair meaning of the deed, though a power is only given, that power is imperative. This intention, then, is to be collected from the deed. Is there here, then, any conception of the residue of real estate being divided in specie? It is necessary in law to use the term 'power,' it is admitted, in order to carry into effect the objects of such deed. But that term 'power' is only once used in that part which applies to the trustees' duty as to the management of the property. It might as well be said, the other parts of that duty was optional, as that the uplifting the heritable bonds, or selling the heritable subjects, were so. The conveyance of the estate of the deceased is with power to uplift and receive moveable debts, and to intromit with goods. This power it was the bounden duty of the trustees to exercise. It is with power, also, to establish legal titles in their persons; there could be no discretion as to that; and to sell or dispose of heritable subjects, and to uplift rents while unsold, and to grant dispositions to purchasers. Reading only so far as that in the deed, though power only is used, it overrides the whole sentence, and he would say it must mean the same thing as to all the acts they have power to do. That it casts the duty of selling on the trustees, as well as the duty of uplifting the moveable debts. Then, after this power is committed, how does the deed provide for the disposal of the money? [His Lordship then went over the purposes or uses of the trust, and again read that clause as to the disposal of the residue, dwelling on the expressions, "when converted into money," and "to pay over."] It is impossible to be of any other opinion than that the only thing intended was to convert

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or were of personal estate. It is for that reason a *donatio mortis causa* is made liable to the duty. That is, a gift which the donor, if he lives, may resume.

Upon the whole, the court are of opinion, there must be judgment for duty on the sums stated in the case, on the first count of the information, those sums being residue from real estate directed to be sold.

Baron HUME suggested that it should be added to the special case (and this was done), that the deeds in question contained a power of revocation, and clauses dispensing with the delivery, and that they were found in the repositories of the deceased undelivered.

Judgment for the crown.

PARRY *against* FAIRHURST and Others.

In an action on the case, the defendants were charged as carriers for negligence in carrying goods, but the proof showed that if liable at all, they could only be sued as wharfingers on a contract to *forward* them. In the course of the cross-examination of the defendants' witnesses, it appeared that

CASE. The declaration stated in the first count, that the defendants before and at the time of the delivery of the goods and chattels to them, as thereinafter next mentioned, were, and from thence hitherto have been and still are common carriers of goods and chattels for hire, to wit, in the county of *Chester*. That the plaintiff, whilst the said defendants were such common carriers as aforesaid, to wit, on &c., at &c., caused to be delivered to the defendants, and the defendants then and there accepted and received of and from the plaintiff, divers goods and chattels, to wit, a pair of millstones of the plaintiff of great value, &c., to be safely carried by the defendants from *Chester* aforesaid

the defendants had put forth bills announcing themselves as carriers, and repudiating their liability for losses of which they did not receive notice within a specified time. No knowledge of these bills was brought home to the plaintiff, nor did it appear that he gave the defendants the notice required. After the defendants' case was closed, and just before the counsel for the plaintiff began to reply, he requested to amend the declaration, under 3 & 4 *W.* 4. c. 42. s. 23. The judge refused the amendment, and left it to the jury to say whether the contract was to carry the goods, or only to forward them. This finding being indorsed on the postea under 3 & 4 *W.* 4. c. 42. s. 24., a verdict was taken for the defendants, subject to the opinion of the court, whether the amendment should be allowed. The amendment was allowed, (*Alderson* J. dissentiente,) and a new trial was granted on payment of the costs of the first trial, as well as of the motion and the amendment; for the amendment should have been allowed, and the trial postponed to a subsequent day, in order to admit further proof by the defendants under s. 23.

intiff, to wit, on &c. The third count charged, that : defendants at their request had the care and cus- ly of two pair of millstones &c. of the plaintiff, of : value of 50*l.* The last count was in trover. Plea, neral issue (*a*).

At the trial before *Vaughan* J. at the summer assizes : *Cheshire*, in 1834, it appeared that the plaintiff was itone merchant in *Anglesey*, and that the defendants re general carriers by canal from *Chester*, where they d a wharf on the *Ellesmere* and *Chester* canal, at nich they in the course of business received goods to : forwarded to all parts of the country, including *'orth Wales*. In *December* 1829, the plaintiff con- acted to deliver two millstones to one *Jenkins*, at *Iewtown*, in *Montgomeryshire*, at the plaintiff's ex- ense. They were accordingly sent by a *Welsh* coaster om *Anglesey* to *Chester*, and at the landing place were laced in the defendants' waggon, to be carried to their 'harf. In lowering them on the wharf, the chain 'hich fastened one of them broke, in consequence of 'hich the stone fell and was much injured. The de- ence was, that the defendants had not undertaken to arry the stones, but that one *Groom*, a carrier from *Chester* to *Newtown*, had. *Smith* swore that he acted in he double capacity of clerk to the defendants at their *Chester* wharf office, and agent to *Groom*, and that the laintiff came to him at the defendants' office, to book he millstones *to be forwarded* to *Newtown*. *Smith* there- upon sent the defendants' waggon and horses to bring he millstones to their wharf, and paid them for the artage as *Groom's* agent. The stones were finally onveyed to *Newtown*, and not being claimed were old to pay the freight in *November* 1832, after *Groom* had become insolvent. After the defendants' case was

(*a*) These pleadings were framed before the new rules of *Hilary* 1834.

evidence given by the plaintiff to establish the defendants' character as carriers to *Newtown*, loose and weak; so that the supposed contract to forward the stones hither, did not clearly appear. Nor did the stage of the cause in which the amendment was prayed allow any opportunity to the counsel for the defendants to address the jury on the record, as altered. [*Parke* B. It was for them to have applied at the trial for leave to do so, and to contend that the facts proved did not apply to the amended count. To forward, means to deliver to others to be taken on. The evidence is right on the original declaration.] The amendment would not be less extensive than turning bailee to bond into debt for escape. Next, supposing the second count to be amended as prayed, a contract to forward the goods would not make the defendants liable in their character of wharfingers; for, as such, their liability implied a common custom to keep them when discharged and deposited with them, and afterwards to deliver them to the owner when called for, and by no means to carry or forward them on their way to *Newtown*. That being so, the plaintiff cannot recover on a count which does not allege a consideration for a contract to forward the goods. [*Parke* B. Would not the delivery of the goods by the plaintiff to the defendants be good consideration for such an undertaking?] At all events, the evidence would not support a contract to forward, the goods having been in fact delivered to *Smith*, who was acting for *Groom* the carrier, to be carried to *Newtown*.

It was here suggested to the court, that advertisements had been issued by the defendants, holding out that they carried goods to *Newtown*, and forwarded them to all parts of *North* and *South Wales*, and that one of them had been produced by a witness for the defendant on his cross-examination by the plaintiff's counsel;

tunity of proving that they were not liable for any loss, unless notice of it was given them in due time. In this case no such discretion was exercised at the time; but the propriety of allowing the amendment was referred to this court by the learned judge. It would be hard on the defendants to send down the case again without payment of their costs of the trial; so that the amendment must take place, and the new trial be had on those terms only.

BOLLAND B. concurred.

ALDERSON B.—Upon the whole I think that this plaintiff should not have the option of amending. Upon the present system of pleading we should do great injustice if we were not liberal in allowing the amendment of variances; but under the special circumstances of this case, and with a view to the probable result of the action, I think that the proposed amendment should not be allowed. I am against the granting a new trial, for as the utmost sum which can be recovered is 15*l.*, it falls within the spirit of the rule prohibiting the granting a new trial, where the damages are under 20*l.* Nor was the amendment asked for in time, for no application was made till just as the plaintiff's counsel was about to reply. I am, therefore, for refusing the application altogether.

GURNEY B.—I feel great difficulty in assenting to the amendment, but under all circumstances I think there ought to be a new trial on terms.

Rule absolute for amending the second count, on payment of the costs of the motion and of the amendment; and for a new trial on payment of costs.

1835.

HARLEY *against* KING.

The assignee of a lease is liable for breach of a covenant to repair, committed during his own possession, though he may have assigned the premises before the action was commenced.

THIS was an action of covenant on a lease brought by the plaintiffs, as assignees of the reversion, against the defendant, as assignee of the lessee. The breach assigned was the non-performance of a covenant to repair, which was alleged to be after the assignment to the defendant, and during the continuance of the demise, and whilst he was possessed of the demised premises with the appurtenances.

Plea, that after the defendant became assignee of the demised premises, as in the declaration mentioned, and before the commencement of the suit, to wit on &c., he the defendant, by a certain indenture of assignment then made and duly signed by him the defendant, and sealed with his seal, for the consideration therein mentioned, did bargain, sell, assign, transfer, and set over unto one *W. P.*, his executors, administrators, and assigns, all and singular the premises in the declaration mentioned, together with the said indenture of lease, and the several assignments thereof, and the full benefit and advantage thereof respectively, to have and to hold the said premises to the said *W. P.*, his executors, &c., from the date thereof, for all the residue then to come and unexpired of the said term of years demised by the said indenture of lease, subject nevertheless to the payment of the yearly rent thereby reserved, and to the performance of the covenants therein contained, and which on the lessee or assignee's part were to be observed and performed. By virtue of which said indenture of assignment, said *W. P.* afterwards, on &c., entered into the demised premises with the appurtenances, and be and was thereof possessed for the residue of the term then to come and unexpired, whereof the tiffs on &c. had notice. Verification.

...d such assignee, and before the making of sig-
he said supposed indenture of assignment in the
a mentioned; concluding to the country.
urrer, stating for special causes that the replica-
s not traverse any matter alleged in the plea,
n issue thereby, and does not confess and avoid
gation therein, or admit or deny that the said
ent in the said plea mentioned was before the
icement of the suit or otherwise, and leaves the
ble fact tendered by the plea wholly unan-
Joinder.

rdorff in support of the demurrer, contended
ere the assignee of a lease containing a cove-
repair has assigned it over, he is not liable for a
committed before such his assignment. For his
ceased with the privity of estate between him
assignor, the reversioner. *Pitcher* v. *Tovey* (*a*)
action of covenant against an assignee, for rent
ccrued due after the assignment, and the court
it covenant would lie against the defendant for
ue in his own time, but *not after*." This may mean
hat the action would not lie for rent not due in
gnee's own time, or if brought after his time (*b*).
ere are several cases in equity from which it
ppear that the assignee's legal liability ends with

of his legal remedies for rent due after breaches of covenant incurred previous to the assignment. In a manuscript note of a case in *Michaelmas* term 12 *G.* 2, furnished me by Mr. *Maddock*, Mr. *Fazakerly* cited a case which was before Lord Chancellor *Cowper*, in which it was argued, that where a lease is assigned to one, and he assigns to a third person, that *though the Lessor has strictly no remedy* against the first assignee, the privity of estate being determined, yet if it appear that the second assignment was made in order to exonerate and discharge the assignor of rent due to the lessor(a), the court will look on it as a fraud, and oblige such assignor to pay the rent *accrued in his own time*, notwithstanding the privity of estate being determined, and there being no covenant from such second assignee."

Channell for the plaintiff was stopped by the court.

Lord ABINGER C. B.—This was an action brought by the assignees of a lessor against an assignee of the lease, upon a covenant running with the land, for a cause of action accruing while the defendant possessed the demised premises, and before he assigned them. The defence is, that the assignment by the defendant took place before the action was brought, and that in order to make an assignee liable, it must appear not only that he is sued on a cause of action arising in his own time, but likewise that the suit was commenced before the assignment; for that by such assignment the privity of estate, upon which only the lessor can proceed, is determined. By the neglect of the assignee to repair, a breach was incurred in his own time, and a right of action thereupon vested in the plaintiffs, which was

(a) See *Taylor* v. *Sham*, 1 B. & P. 21; and *ante*, 3 Tyr. R. 640.

of estate continues, the assignee is liable on
nants running with the land. If on the breac
such covenant the lessor may sue the assigne
the continuance of his possession of the premis
is there to alter the right of action, or to pr
from vesting after a re-assignment? There may
of specific breaches of covenant, where to hold
trary, and to subject a subsequent assignee to
for them, would be to commit great injustice.
nant may exist with regard to repairing and kee
machinery, or other valuable property, the om
perform which by the successive tenants of
mises nothing could compensate or cure. If
signee can free himself by assignment from the
to make good his own default, is his assigne
charged with the whole amount, or to whom
lessor to resort? It can never be contended,
an assignment to a beggar, an assignee shall be
to free himself from liabilities to which as such
subject, and the right to enforce which against
vested in another.

PARKE, BOLLAND and ALDERSON Bs. concu

Judgment for the pl

(a) That a lessee is liable during his term for breach of covena

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STARTUP and Another *against* CORTAZZI.

Assumpsit for not delivering linseed according to contract. It appeared that under the contract the vendee had paid part of the purchase money in advance to the vendor, who, about the time at which he ought to have delivered the linseed, gave notice that he could not do so. After the action was brought, the purchase money was paid back by the defendant into court with interest to the time of such payment; such payment being a condition imposed by the court before granting him a commission to examine witnesses abroad. No evidence was given of special damage from the breach of contract or the

ASSUMPSIT for not delivering linseed, pursuant to a contract made by the defendant on the 18th *June* 1833, to sell 2100 quarters of *Odessa* linseed to the plaintiff, warranted good and marketable, and equal to the average shipments of the season, at the rate of 30*s.* for each quarter, free on board a ship to be provided by the plaintiff. The quantity to be estimated at the rate of 100 chetwerts to 75 quarters; to be shipped on board the buyer's vessel in all *October* or *November* then next; the amount to be paid for, half by bills on buyers, three months from date of advice of sale reaching *Odessa*, and the remainder on banker in *London*, at three months from the date of the bill of lading and shipment.

Plea: general issue (*a*). At the trial at *Guildhall* before Lord *Abinger*, at the *London* sittings after last term, it appeared that the plaintiffs vessel arrived at *Odessa* in *October* 1833, but left after a short stay, the master having received notice from the plaintiffs that the contract would not be performed. On 15th *October* 1833, the plaintiffs had paid 1575*l.* to the defendant, being half the purchase money of the expected cargo. The defendant paid that sum into court, with interest, on 15th *September* 1834, in consequence of terms imposed on an application by him to examine witnesses abroad; and 524*l.* additional was afterwards paid in, making 2174*l.*: which sum was, in *February* 1835,

(*a*) There was a special plea on demurrer, to which the plaintiff had had judgment.

privation of the money advanced to the defendant, or of the object for which the seed was wanted by the plaintiffs. Held, that the damages were not to be estimated by the advanced price borne by linseed at the time of the trial, but by its price at the time when it ought to have been delivered according to the contract; and a verdict founded on that principle was confirmed.

is till *February* 1835, assimilates their situation to that of a lender of stock, who is entitled to the price of replacing it at the trial. In *Gainsford* v. *Carroll* the cause of action was for non-delivery of bacon at a certain day; and the court said, "in the case of a loan of stock, the borrower holds in his hands the money of the lender, and thereby prevents him from using it altogether. Here, the plaintiff had his money in his possession, and might have purchased other bacon of the like quality the very day after the contract was broken." That observation applies; for the defendant's retaining the plaintiffs' money, prevented them from using it in buying other goods. The plaintiffs having received some interest on their purchase money does not deprive them of their right to calculate the damages in this manner; for they were entitled to the profit they might have made of the money if used in trade.

Lord ABINGER C. B.—The plaintiffs did not show any particular purpose for which they wanted this seed, as for sowing, crushing, or selling it instanter; nor that *Odessa* linseed was peculiarly requisite for any object they had in view in making the contract. As they did not appear to have sustained any particular injury from the breach of it, I told the jury that no precise line was chalked out by the plaintiffs for determining the amount of damages. The plaintiffs' counsel had contended that they were entitled to have the profit which might have been made of the money advanced by employing it in commerce; but I expressed my opinion that the jury, in estimating the damages, could not take into consideration speculative or possible profits, but could only give the money actually advanced, with interest on it. The plaintiffs were not shown to have been in a situation to make more on that money than the five per cent. they had reserved, or to have sustained particular inconvenience by the withholding

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the money. In this defective state of the proof I pointed the attention of the jury to the estimate of one of the defendant's witnesses called in support of the amount paid into court. I added, that if the cargo had been shipped in pursuance of the contract, the plaintiffs must have paid the rest of the purchase money. At the same time I wholly abstained from prescribing any line to the jury as one which they should adopt, though I cautioned them against giving damages on any speculative notion. Nor am I dissatisfied with their finding.

BOLLAND B. — It appears to me, that the way in which this case was left to the jury upon these facts, was the only way in which it could have been properly left to them. Nothing appeared to point out any decisive line for estimating the damages, and the caution against giving speculative damages was called for by the arguments of the plaintiffs' counsel.

ALDERSON B. — The mode of computing the damages was the only matter in question. The defendant had contracted to deliver a certain quantity of linseed at a given time, viz. on the arrival of a particular ship in *London*. Before that took place, the defendant gave the plaintiffs notice of his inability to perform his contract. The price which the article bore at the time of the notice was not the proper standard by which to estimate the damages, for the plaintiffs were not then in a condition to purchase other seed, having on this contract advanced the money they had provided to pay for it. In my opinion, the more correct estimate of the damages would be made, by ascertaining the price at the time when the cargo would have arrived had the contract been performed in due course; for had it been then delivered, the plaintiffs would have been able to resell it immediately. Another mode of computing the

damages is to consider the real loss sustained, viz. the loss of the gain the plaintiff might have made had the money been supplied with by the defendant. Here the plaintiff's loss is that which arises from their being kept out of their money. The interest to which they are on that account entitled must be calculated up to the time when the plaintiffs would have been entitled to take the money out of court, and thus to regain possession of the sum they had parted with to pay for the seed. As no special damage was proved, I think the verdict right.

COLTMAN B. concurred. Rule refused.

SIMON *against* LLOYD.

Assumpsit for goods sold.

Plea, as to 9*l.*, that after the making of the promises,

ASSUMPSIT for goods sold and delivered, money lent, and on an account stated. Plea, as to the sum of 9*l.*, that after the making of the promise as to 9*l.*, to wit, the commencement of the suit, defendant at plaintiff's request drew a piece of paper, having thereon a 1*s.* 6*d.* bill of exchange stamp, an instrument purporting to be a bill, without a drawer's name thereto, whereby the defendant was required to pay to *such person or his order, who should place his name thereto as drawer*, 20*l.* at two months after date, as for value received; which instrument plaintiff requested defendant to accept towards payment and satisfaction of 9*l.* and for the plaintiff's accommodation as to the rest, and which the defendant accepted accordingly, and delivered to the plaintiff, and thereby became liable to pay to the plaintiff or such person who should place his name thereto as drawer, or his order, the sum of 20*l.* viz. towards payment of the sum of 9*l.* and for the plaintiff's accommodation as to the rest, and that the plaintiff accepted and received the bill in satisfaction of the sum of 9*l.*, which bill was not due at the commencement of the suit. Non assumpsit to the residue.

Replication, that the bill remained unnegociated in the hands of the plaintiff without any drawer's name to it, and unpaid. Held, on demurrer to the replication, that it was bad, and the plea good; for, upon the facts disclosed in the plea, the plaintiff's right to sue for the original debt was suspended till the expiration of the two months, and till the maturity and dishonour of the instrument when completed as a bill.

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that sum, and before the commencement of the suit the said defendant, at the request of the plaintiff, made and drew on a piece of paper, having a stamp denoting a bill of exchange stamp duty thereon of the sum of 1s. 6d., a certain instrument purporting to be a bill of exchange, without a drawer's name thereto, whereby the defendant was requested to pay to such person or his order in *London*, who should place his name thereto as the drawer thereof, 20l. two months after the date thereof, as for value received in goods and cash; that the plaintiff then requested the defendant to accept the same towards the payment and satisfaction of the said sum of 9l., and for the said plaintiff's benefit and accommodation as to the rest, and that the defendant accordingly accepted the same and delivered it to the plaintiff, and thereby became liable to pay to the plaintiff or to such person who should place his name thereto as the drawer thereof, or his order, the sum of 20l.; that is to say, towards the payment of the said sum of 9l., and for the benefit and accommodation of the plaintiff as to the rest; and that the plaintiff then accepted and received the said bill in part toward the payment and satisfaction of the sum of 9l. Averment of liability by the defendant to pay the bill to whoever might be the holder thereof, and that the bill was not due at the commencement of the suit. Non assumpsit to the residue of the money mentioned in the declaration.

Replication, that the bill remained unnegociated in the plaintiff's hands (*a*), without any drawer's name having been put to it, and that it remained unpaid. Demurrer and joinder.

R. V. Richards in support of the demurrer. The replication does not answer the plea, for all that was

(*a*) See 5 T. R. 518; and *Lewis* v. *Lyster*, *ante*, 195.

mits this action to be commenced before the bill
e becomes due, had it been put into circulation.
a name might have been added at any time (a),
ut it, it is a promissory note; so that ever
defendant gave it to the plaintiff, he has
le to be sued by any bonâ fide holder to
plaintiff might indorse it. Then the plain-
t to sue is suspended while he holds the
nouncing the defendant, by putting this instru-
culation against him. All that the plaintiff
n replication is, that he has not negociated
ut that is no answer to the plea, if he can do
time.

in *contra*. The first fault is in the plea,
nds no answer to the declaration. It is not
l in this case, that the debt is extinguished
arslake v. *Morgan* (*b*), because this instrument
ete. A simple contract debt cannot be extin-
xcept by specialty. Nor can it be here got rid
of accord and satisfaction, for the plaintiff has
ot satisfaction, but a mere blank acceptance,
a promise to pay a bill when filled up, which is
ater value than the original contract; so that
o consideration for the plaintiff's agreeing to
ill in satisfaction of his debt.

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on the plaintiff to suspend his remedy for payment of the 9*l.* for two months: but the pleadings show that the action was brought before that time had elapsed. The plaintiff should have waited until the expiration of the two months, and then have given up the instrument in question to the defendant before bringing this action. Our judgment must be for the defendant.

PARKE B.—This is an absolute engagement by the plaintiff to postpone his right to sue for 9*l.* for two months at all events. Then as he admits the truth of the plea by pleading over, he absolutely accepts the instrument out and out in satisfaction for so long. The defendant, by writing his name on this paper as acceptor, entered into a promise to pay the amount when completed as a bill; a promise which he cannot now help performing, having authorized the putting the name of any person to it as drawer. His authority so given being irrevocable, formed a valuable consideration for the plaintiff's promise to suspend his remedy for two months; for he could use the defendant's name for 20*l.* for that time. This is in fact an agreement by the plaintiff to forbear to sue the defendant for two months, if the latter would pay him his debt at the end of that time, and lend him 11*l.* till then. The replication is therefore bad.

The other barons concurred.

On application by *J. Jervis* to amend the replication by traversing the averment in the plea, that the plaintiff accepted the bill in satisfaction, the court permitted that amendment, on payment of costs as between attorney and client.

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CHADWICK *against* HOUGH.

THE notice of bail was signed "*Eley, Chancery Lane*, by Mr. *Cole*." *Cole* was an attorney of this court, *Eley* was not, but had liberty to practise in it in the name of *Cole*.

Where an attorney of this court permits an attorney of another court to practise in it in his name, the proceedings, notices, &c., must be in the name of the former *only*.

Butt opposed the justification of bail, on the ground that *Eley* should have used *Cole*'s name.

Heaton contrà. *Eley* has not affected to practise in his own name.

ALDERSON B.—As *Eley* had authority to use *Cole*'s name, the proceedings and notices should be given in the name of the latter. The act should appear to be that of *Cole* as an attorney of this court. You may amend the notice and bring the bail up to-morrow, without giving fresh notice.

Earl of FERRERS *against* ROBINS.

CASE. The declaration stated, that in consideration that the plaintiff, at the request of the defendant, sold furniture for ready money only, sold it, but took in payment a bill of exchange drawn by the purchaser on a third person. The plaintiff refused to take the bill, and applied for the proceeds of the sale, but his agent afterwards obtained the bill from the defendant to get it discounted. It was never presented for payment; the drawer never had notice of its dishonour, and ten days elapsed after it became due, before the defendant had such notice: Held, that the defendant was liable in an action brought against him for negligence in selling otherwise than for ready money, notwithstanding the plaintiff had not presented the bill for payment, and, by not giving notice of dishonour to the drawer, had discharged him from liability on the bill. *Semble*, that the defendant might sustain a cross-action against the plaintiff to recover any damage sustained by him, in consequence of such negligence preventing him from recovering on the bill (*a*).

The defendant being employed by the plaintiff to sell

(*a*) Another point in this case reported in 2 Dowling's Pr. C. 636, is contradicted in *Lord Aldborough* v. *Burton*, 2 Mylne & Keene, 401.

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fendant, had retained and employed the defenc sell and dispose of, for ready money, certain goo chattels, to wit, &c., for certain commission and to be paid to the defendant in that behalf, the d ant then and there promised the plaintiff to s dispose of the same, but not otherwise than for money: yet the said defendant, not regardin sold and disposed of the said goods and chattels said plaintiff for a large sum of money, to wit, tl of 750*l.*, otherwise than for cash, to wit, for a bill of exchange, drawn by one *R. Mott* upo accepted by one *Dufresne*, who respectively we are in bad and insolvent circumstances, and by thereof the same bill hath been and is of no value to the plaintiff, and by reason of the prem the said plaintiff is likely to lose the same. (before the new rules of pleading) not guilty.

At the trial before *Gurney* B. at the *Mi* sittings after *Hilary* term last, the following ap to be the facts. The earl having assigned his l a house in *Harley Street* with the fixtures to wished afterwards to sell the furniture, for purpose he employed the defendant, directing sell it by auction, and on no other terms than fo money. The defendant, however, sold the furni private contract to *Mott* for 750*l.*, and delivere him on the defendant's giving a bill for that sum by himself, and indorsed in blank and accep *Dufresne*. The plaintiff refused to receive t from the defendant, and sent it back to him, req him to pay him the proceeds of the sale in While the bill was running, an agent of the p having seen the defendant, took it out of his h order to try to get payment, and left it at the tiff's bankers to be discounted. It did not that the bill was ever presented for payment,

notice of its dishonour was given to the defendant, till ten days after its maturity; nor did *Mott* ever receive any such notice. For the defendant it was objected, that if the defendant had become liable for the proceeds of the sale, by taking this bill instead of selling for ready money, still after the plaintiff had taken possession of the bill in order to get it discounted, he should have presented it for payment, and given the defendant notice of its dishonour in such proper time as would have enabled him to give due notice to *Mott*. The learned baron asked the jury, whether the plaintiff had ever made the bill his own by consenting to take it from the defendant as payment for the furniture. They found in the negative, and gave a verdict for the plaintiff.

F. Kelly now moved for a new trial. The learned judge should have directed the jury, that the defendant being a mere surety for payment of the bill, was discharged by the plaintiff's neglect to present it in due time, which, by hindering the defendant from giving *Mott* the drawer notice of dishonour in due time, discharged the latter from all liability to the defendant on the bill. He mentioned *Philips* v. *Astling* (*a*). The defendant had not the control of the bill at its maturity.

Lord ABINGER C. B.—I am of opinion that there is no ground for a new trial in this case, and that the case was properly left to the jury. It is clear that the defendant was bound to sell for ready money only, and that the plaintiff was not bound to take the bill. The main question is, whether the plaintiff's agent received the bill from the defendant under such cir-

(*a*) 2 Taunt. 206; see *Murray* v. *King*, 5 B. & Ald. 165.

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cumstances as relieved him of responsibility and made the bill the plaintiff's. If he did, that might have deprived the plaintiff of all remedy except on the bill, and would have been an answer to the action. But the jury found that the plaintiff did not take the bill in satisfaction for the proceeds of the furniture. Then how does the case stand? The defendant being applied to by the plaintiff for 750*l.*, which he was liable to pay, suffered the plaintiff's agent to take the bill for the purpose, as appears from the finding of the jury, of attempting to get it discounted. If the plaintiff has been guilty of such laches in taking the proper means to procure payment of the bill, or in not giving the proper parties such due notice of dishonour as would discharge any of them from liability on the bill, and prevent the defendant from recovering on it, the latter would have a right of action for such negligence, and would recover for any damage he might be proved to have suffered; but that affords no answer to the present action for the defendant's negligence in selling the furniture for a bill instead of ready money. Though *Mott* the drawer might have no effects at all, the acceptor was still liable on the bill.

Bolland and Alderson Bs. concurred.

Rule refused.

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NOWLAN *against* ABLETT.

ASSUMPSIT. The first count of the declaration stated, that theretofore, to wit, on the 14th *March* 1834, in consideration that the plaintiff, at the request of the defendant, had become and was the servant of the defendant, to wit, in the capacity of head gardener, to serve him for a year then next following, at and for certain wages, to wit, the wages of 100*l.*, the defendant undertook and promised the plaintiff to retain and employ him in his service and in the capacity aforesaid, and at and for the wages aforesaid, and to continue him in such service and employ for and during the said term of a year: and although the said plaintiff, confiding &c., did continue in such service and employ of the defendant for a long space of time, to wit, until the 15th *December* 1834, and although the said plaintiff hath always been ready and willing, and then offered to continue in the said service and employ of the said defendant in the capacity aforesaid, on the terms aforesaid, for the said term of a year, yet the defendant, not regarding &c., did not nor would continue the said plaintiff in his said service or employ for and during the said term of a year; and afterwards, and before the expiration of a year of the said service, to wit, on the day and year last aforesaid, put an end to such service and employ, and wholly refused to suffer or permit the plaintiff to continue in his said service and employ, and then discharged him the said plaintiff therefrom without any reasonable notice or warning previous thereto, and hath from that time hitherto wholly refused to retain or employ him in the said service, or pay him the said wages for the residue of the same term of a year, by means whereof, *&c.* There was another count in indebitatus assump-

The plaintiff was hired by the defendant as head gardener to manage extensive hot-houses &c., at 100*l.* wages. He lived in a gate-house belonging to the defendant, within his domain, but 200 yards from his house. After the plaintiff had stayed four years, the defendant gave him a month's warning to quit. The plaintiff having sued for a quarter's wages: Held, that he was a domestic servant within the custom of determining the yearly hiring of such servants by a month's warning or a month's wages, and that he was not entitled to more than the month's wages. *Semble*, that custom will be recognized judicially without proof.

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sit for wages and for money due on an account st[illegible]
Pleas: first, to the first count, that the defendant [illegible]
no such promise; secondly, that the said pla[illegible]
became and was the servant of the defendant, as in [illegible]
said first count mentioned, upon certain terms, [illegible]
according to a certain proviso, to wit, upon, among
others, the terms, and according to the proviso following; that is to say, that either of the said parties might determine the said service upon giving to the other of them one calendar month's notice of his intention so to do, and that in case of the defendant's determining the said service, he should pay to the said plaintiff a proportionate part of his wages aforesaid [illegible] to the expiration of such notice, and to the time [illegible] such determination of the said service: and the said defendant in fact further saith, that heretofore, a[illegible] one calendar month before the said defendant put [illegible] end to the said service and employ, or refused to suff[illegible] or permit the said plaintiff to continue in his sa[illegible] service and employ, or discharge the said plaintiff theretofore, to wit, on the 15th day of *November* A. [illegible] 1834, he the said defendant gave to the said plaintiff one calendar month's notice of his the said defendant's intention to put an end to the said service and employ and to discharge the said plaintiff therefrom: and the said defendant further saith, that after the expiration of the said calendar month, and at the determination of the said service, he the defendant was ready and willing, and then offered to pay to the plaintiff a proportionate part of his wages aforesaid up to the expiration of the said notice, and to the time of the determination of the said service; concluding with verification.

Thirdly, to the last count, payment into [illegible] of 21*l.* 13*s.* ready to be paid to the plaintiff, [illegible]ring that the plaintiff had not sustained damag[illegible]

a greater amount than that sum of 21*l.* 13*s.* in respect of the causes of action in the last count of the declaration mentioned. Verification.

Replication to the second plea, that the plaintiff did not become nor was the servant of the defendant, as in the said first count mentioned, upon the terms and according to the proviso in the said second plea alleged.

The plaintiff took out of court the money paid in on the last plea.

At the trial at the last *Denbighshire* assizes before *Bolland* B. it appeared, that in the winter of 1829 the plaintiff had been employed as a gardener in *Kew Gardens*, at weekly wages. The defendant having pineries, hothouses, &c., was desirous to have him as head gardener, and said, "What wages am I to give you?" to which the plaintiff replied, "I shall not come from *Kew* without 100*l.*" Nothing was said about notice. The plaintiff entered the defendant's service in *March* 1830, and occupied a gate-house of his master's, situate in his grounds, about 200 yards from his house. The plaintiff was suffered to take two apprentices at 15*l.* a-year each, and had five under-gardeners. The defendant gave the plaintiff a month's warning, expiring in *December* 1834. For the defendant it was contended that he was entitled to a year's wages. The learned judge, in his charge to the jury, mentioned several situations, the holders of which, whether engaged in terms for a year, or generally in a manner from which the court would imply a hiring for a year, would be entitled to more than a month's warning or wages on their discharge, not being considered in law as menial servants (*a*); and then desired them to con-

(*a*) For example, a clerk to an army-agent, *Beeston* v. *Collyer*, 4 Bing. 309; to a merchant, *Gandell* v. *Pontigny*, 1 Stark. C. N. P. 98; S. C. 4 Camp. 375; to an auctioneer, *Thomas* v. *Williams*, 1 Adol. & Ell. 685; to a warehouseman, *Fawcett* v. *Cash*, 5 B. & Adol. 904.

first quarterly, afterwards monthly; and that he staid till 23d *December* 1826, when he was discharged. The court, after implying a yearly hiring, held that he was entitled to recover a quarter's salary, viz. till *March* 1827, that being the period when he entered the service. In *Turner* v. *Robinson* (*a*) a foreman of silk manufacturers was to have wages "*at the rate* of 80*l.* a year;" the court presumed the hiring to be for a year, and held, that having been rightfully dismissed before the year expired for misconduct in enticing away the master's apprentice, he could not recover wages even *pro ratâ*. In *Fawcett* v. *Cash* (*b*), the plaintiff entered the defendant's service as warehouseman at 12*l.* 10*s.* for the first year, and to advance 10*l.* a year till the salary was 180*l.* The court held this a contract to employ the plaintiff for a year at least, and *Denman* C. J. said, "The general rule is, that if a master hire a servant without mentioning the time, that is a general hiring, and in point of law a hiring for a year. Then, assuming that the agreement in this case does not specify the period for which the service or employment was to continue, it must be taken to be a contract for a year's service;" and *Littledale* J. added, "In the case of domestic servants, the rule is well established, that the contract may be determined by a month's notice or a month's wages; but that depends on custom. Here, no custom having been proved, the contract must be taken to be a hiring for a year." Then it was for the defendant to prove the custom he set up contrary to the general implication of law.

Lord ABINGER C. B.—I have never known that done. Suppose a footman to be discharged on a month's notice, or at a moment, without paying him a

(*a*) 5 B. & Adol. 789. (*b*) 5 B. & Adol. 904.

And see *Thomas* v. *Williams*, 1 Adol. & Ell. 685. But a servant, of whatever description, hired at yearly wages, and discharged for misconduct without warning, cannot recover wages *pro ratâ*; *Robinson* v. *Hindman*, 3 Esp. C. N. P. 235; *Turner* v. *Robinson*, 5 B. & Adol. 789; *Spain* v. *Arnott*, 2 Stark. C. N. P. 256. In *Robinson* v. *Hindman*, the custom of hiring domestic servants at yearly wages, the contract being determinable at a month's warning, or on payment of a month's wages, was recognized by Lord *Kenyon*; see also per *Gaselee* J. 4 Bing. 313, and *Littledale* J. 5 B. & Adol. 908; and it now appears to be one of the general customs of the land judicially taken notice of without further proof.

BELCHER and Others, Assignees of EVANS, a bankrupt, *against* MILLS and another.

A party being arrested gave a bail-bond, but in consequence of his not perfecting special bail, the sheriff was fixed. The plaintiff having sued on the bail-bond, a summons was taken out on behalf of the bail, and a judge ordered the proceedings to be staid, on payment of debt and costs to the attorney for the original plaintiffs, by the attornies of the original defendant, who had in the meantime become bankrupt, but had, before his bankruptcy, supplied them with a sum of money towards paying this debt and costs; the money having been paid over accordingly, held that this payment under the judge's order was payment under process of law, and that *A.*'s assignees could not recover it from the original plaintiffs, to whom it was so paid. *Semble*, their remedy was against the bankrupt's attornies, who paid over the money after the bankruptcy.

ASSUMPSIT for 31*l.* 1*s.* 5*d.* money had and received by the defendants to the use of the plaintiffs, as assignees, with a count on an account stated with them as such. Plea, non assumpsit. The cause was tried before *Gurney* B. at the *London* sittings after last term, when it appeared, that on 24th *September* last the bankrupt was arrested by the present defendants, and gave a bail-bond to the sheriff, executed by two others and himself. On 1st *October* (being within the eight days for putting in special bail allowed by 2 *W.* 4. c. 39. schedule No. 4.) an order was obtained for time to put in bail till 4th *October*, on the terms that the plaintiffs should be at liberty in the meantime to rule the sheriff to return the writ. They did so, and he returned *cepi corpus*. On 3d *October* notice of bail

property, and by vesting it in his assignees, had the effect of a countermanding the authority to pay it over. This action is, therefore, maintainable; for the money being the plaintiffs' property, was had and received to their use.

W. H. Watson contrà, was stopped by the court.

PARKE B.—This money was at one time the property of the bankrupt, but it is difficult to say that it came to the defendant as his money. As far as the plaintiffs are concerned, it was recovered as belonging to the sheriff, who was fixed by the pressure of law adopted against him by the defendants. It would be hard on them to be deprived of it, now that their remedy against the sheriff is gone. They were compelled by the judge's order to take the money, and are now sought to be made liable to an action for so taking it. Money recovered by due course of law cannot be afterwards taken from the party. The case is the same, as if the money had been recovered from the sheriff under compulsion by attachment. If the attornies of the bankrupt have paid over the money improperly since the bankruptcy, the assignees' remedy is against them.

Rule absolute for a nonsuit.

See *Porter* v. *Cooper*, *post*.

SCOTT *against* ROBSON.

Where a plaintiff delivered demurrer books, pursuant to *Reg. Gen. Hil.* 4 *W.* 4. No. 7, but the defendant did not, and instead of appearing to argue the demurrer, offered to give a cognovit; the plaintiff had judgment without calling for delivery of the defendants' demurrer books. *Semble*, the rule only applies to demurrers intended to be argued, and not to demurrers in the common paper.

THE plaintiff delivered his demurrer books, according to *Reg. Gen. Hil.* 4 *W.* 4. No. 7., [*ante*, Vol.

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IV. p. ii.,] but the defendant did not deliver his. The demurrer being called on for argument,

Humfrey, for the plaintiff, stated that the defendant had offered to give a cognovit, and did not intend to appear. No one appearing, the Court gave the plaintiff judgment, without requiring the defendant to deliver any demurrer books.

Lord ABINGER C. B. intimated that the Court had directed two papers to be made out, one a common and the other a special paper, as in the King's Bench; so that it must be declared to the officer of the Court whether or not a demurrer was intended to be argued.

ALDERSON B. added—When there is a common as well as a special paper in this Court, the rule as to delivering paper books will only apply to the latter paper.

Judgment for the plaintiff.

HAMBER *against* COOPER.

A defendant arrested for a debt of 70*l.* stated an account with the plaintiff, who consented to his discharge on giving a bill of exchange accepted by himself, but drawn by another person. Held, that the defendant might be again arrested on the bill, though it was a new security for the original debt; for in an action for the original debt the bill might be well pleaded in accord and satisfaction. *Semble*, the original debt was extinguished by the defendant giving the plaintiff the additional security of a third person, the drawer of the bill.

ASSUMPSIT on a bill of exchange by the payee against the acceptor. The defendant having been arrested for 70*l.*, of which 40*l.* was barred by the statute of limitations, was discharged by consent of

e plaintiff, on giving him a bill for 30*l.*, drawn by another person, and accepted by himself. That bill as dishonoured and renewed by another similar bill, pon which last the defendant was again arrested.

Humfrey moved to discharge him out of custody on iling common bail. *Nemo debet bis vexari, si constet curiæ quod sit pro unâ et eâdem causâ* (*a*). The defendant's debt on the bill, though reduced in amount, s the same *pro tanto* as that original debt for which the bill is substituted; for it is not stated to have been accepted in accord and satisfaction. *Taylor* v. *Wasteneys* (*b*) is expressly in point to show that this was not a fresh debt, but only a further security, which did not extinguish the former cause of action. *Turner* v. *Schomberg* (*c*) also applies. Again, in *Wilson* v. *Hamer* (*d*), a defendant obtained his discharge from arrest by giving a security which afterwards proved inadequate. The defendant being arrested again, gave a bail-bond; but the Court of Common Pleas ordered it to be cancelled, on the ground that no fraud appeared to have been committed by the defendant, and that it was an arrest for the same cause of action, though after giving a new security. Fraud, *e. g.* giving a check on a party with whom the drawer has no assets or connection (*e*), or the not giving a bill, according to the condition on which the discharge took place, would alter the case, *Cantellow* v. *Freeman* (*f*).

Lord ABINGER C. B.—The original debt was extinguished by the plaintiff's taking the security of the

(*a*) *Sparry's* case, 5 Co. 61. See *Ferrer's* case, 6 Co. 7. Cro. El. 667. 2 Bla. R. 831. 3 Wilson, 308, and authorities collected, 1 Chitt. R. 273 n. Tidd, 9 ed. 174.

(*b*) Stra. 1218. (*c*) Stra. 1234.

(*d*) 1 Moore & Scott, 120. See also 8 Bing. 54. 1 Dowl. P. C. 248. S. C.

(*e*) *Puckford* v. *Maxwell*, 6 T. R. 52. (*f*) *Ante*, 3 Tyr. R. 579.

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third person, who drew the bill, in addition to that c the defendant, who accepted it (*a*). That bill migl have been pleaded in accord and satisfaction; for, b conferring on the plaintiff a right of action against th drawer, the defendant, as acceptor, gave a good cor sideration for the extinguishment of the original caus of action against himself only.

PARKE B.—It is hard to say that the defendant ma not be held to bail as well as maintain an action on th bill, considered as a new security for the original de In the case of *Taylor* v. *Wasteneys*, the new securi given appears to have been that of the defendant only who, having been arrested for 25*l.*, was discharged on supersedeas, and afterwards gave the plaintiff a note for 20*l.*, upon which he was again arrested. I do not doubt that this bill is a good accord and satisfaction of the original debt, if it was, in fact, accepted as such. It is here unnecessary to say that the original demand was extinguished, for it was actually reduced from 70*l.* to 30*l.* on a statement of accounts, and a security, new and additional for all purposes, was given for the latter sum. The case in the Common Pleas was one of arrest for the original cause of action.

BOLLAND and GURNEY Bs. concurred.

Rule refused.

(*a*) See *Lewis* v. *Bowen Jones*, 4 B. & Cr. 506. *Steinman* v. *Magnus*, 11 East, 590. *Good* v. *Cheeseman*, 2 B. & Adol. 328. *Cooper* v. *Phillips*, 5 Tyr. 166.

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RIDDELL *against* PAKEMAN.

PASS for false imprisonment. Plea, first, the eral issue; secondly, as to the assaulting and ld of the plaintiff &c., that before and at the he issuing of the several writs thereinafter d, and also at the time of the committing &c., idant was indebted to the plaintiff in a large oney, to wit, the sum of 20*l.*; and the plaintiff indebted to the defendant, the defendant, for ery of the said debt, to wit, on &c., sued out ourt of our Lord the now King, before the f his Majesty's Exchequer at *Westminster*, a rit of our Lord the King, called a *capias*, o have been marked and indorsed for bail for to have been delivered to the sheriff, and re- r him *non est inventus*,) whereupon the de- according to the form of the statute in such and provided, to wit, on &c., sued and pro- ut of the court of Exchequer at *Westminster*, writ of our said Lord the King, called a writ *icias*, directed &c. Averment that it was in- r 20*l.*, and delivered to the sheriff to be exe- id that, after being four times demanded, the ppeared and rendered himself to the sheriff. upon the said sheriff, and the defendant in nd by his command, on &c., under and by he last-mentioned writ, and before the return the plaintiff, and for default of bail seized which are the several supposed trespasses luding with a verification.) Replication, ffidavit was made and filed of record of the

An affidavit of debt, stating a party to be indebted to the plaintiff in 20*l.* on a promissory note, without stating the amount for which the note was made or payable, will be set aside on motion for irregularity.

But where in an action for false imprisonment the defendant pleads the return of *non est inventus* to a writ of *capias*, and justifies arresting the plaintiff on an *exigi facias*, and after replication that no affidavit of debt was duly made and filed, the defendant in his rejoinder avers that there was, and sets forth an affidavit open to have been set aside for irregularity in the above respect:—Held, on special demurrer to the rejoin-

defendant was entitled to judgment, because trespass is only maintain- he process is an absolute nullity, not where it is merely erroneous in s not been set aside on that account by authority of the court.

said cause of action &c., as follows; that is to s
the Exchequer of Pleas. *Wm. Pakeman,*
maketh oath and saith, that *Josh. Hadley R*
indebted to him in the sum of 20*l.* and upwar
promissory note drawn by the said *J. H.*
payable to one *Charlotte Moore,* or order,
now passed, and by her indorsed to this d
W. P. Sworn &c.," as by the said affidavit &
cluding with a verification.) Demurrer, assig
causes that the affidavit of the cause of actio
quired by the statute in such case made and p
does not state the amount for which it was pay
merely states that the plaintiff was justly and
debted to the defendant in the sum of 20*l.*
wards, on a promissory note drawn by the
payable to one *Charlotte Moore* or order, an
indorsed to the defendant. Joinder in demur

Petersdorff in support of the demurrer. T
ceedings under which the defendant justifies
prisonment are founded on an affidavit of debt,
clearly bad (*a*). [Lord *Abinger* C. B. We d
quire you to labour the point, that the defenda
have been discharged from arrest, on motion
gularity in this affidavit. Had it stated that
was due to the plaintiff on the note as for
only it might have been good; but as there

iguity on the face of it, whether to make the sum nount to 20*l.* it was not necessary to add some aim for interest, it is without doubt irregular. How-ver, it does not follow as a consequence of the de-ndant being so entitled to his discharge, that an tion can be maintained for the arrest, where the pro-edings have not been set aside in fact, on motion.] he general question here raised is, whether, in order establish a defence to an action for false imprison-ent under mesne process, it is not absolutely requisite at the affidavit of debt on which the arrest proceeds ould state the cause of action, consistently with 12 . 1. c. 29. s. 2. It is contended, that wherever from insufficient affidavit or error in the process, even if rely technical, there is no right to arrest the de-ndant at all, he may sue for the false imprisonment. *ersons* v. *Loyd* (*a*) is in point. The marginal note is One was arrested by a *capias ad respondendum*, tested *Trinity* and returnable in *Hilary* term following; e writ was set aside as void. Trespass for false im-isonment lies against the plaintiff in that writ, and cannot justify under a void or *irregular* writ." This idavit is not irregular merely, but void, and no affidavit all, not being made pursuant to 12 *G.* 1. c. 29.; for e defendant may not have been liable to any cause of tion by the plaintiff, for which he could be arrested. he mere omission of the defendant's name would be a re irregularity, but this goes to the foundation of the tion. The affidavit of debt should show affirmatively the circumstances under which he has a right to est the defendant. The necessity for that rule is evi-nt from this, that the defendant cannot contradict, or plaintiff explain the affidavit of debt, by contrary supplementary affidavits.

) 3 Wils. R. 341. See S.C. 2 Bla. R. 845. Also, *Bates* v. *Pilling*, & Cr. 41. *Barker* v. *Braham*, 3 Wils. 368.

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RIDDELL v. PAKEMAN.

T. Peake for the defendant, was stopped b court.

Lord ABINGER C. B.—Our judgment must l the defendant. The defect in the affidavit o sworn in the original suit, only rendered the pr ings in it voidable by authority of the court, on p application. But till those proceedings were aside by our authority, no right to maintain this could by possibility arise. In *Parsons* v. *Lo* writ itself was a nullity, and void. Lord Chief J *De Grey* says, " There is a great difference be *erroneous* process and *irregular* (that is to say, process; the first stands valid and good until reversed, the latter is an absolute nullity fro beginning; the party may justify under the first be reversed, but he cannot justify under the because it was his own fault that it was irregul void at first." He goes on to call the writ a void gular writ.

PARKE B.—A writ founded on an irregular a of debt must be set aside, before any action c maintained for false imprisonment under it. No courts commonly refuse to interfere by setting proceedings for mere irregularity, where the def has not been prompt in his application, or has a bail-bond, or has been guilty of laches in maki motion (*a*); but it was never supposed that h thereupon a right to sue the plaintiff for false sonment. Again, an arrest in trover would be stat. 12 *Geo.* 1. c. 29. though by a mere regula the judges (*b*), such an arrest, if made without ord judge, is irregular. Could it be contended that ar

(*a*) See Tidd, 9th edit. 161, 448, 513.

(*b*) See Reg. Gen. *Hil.* 48 *Geo.* 3. Tidd, 9th edit. 172.

false imprisonment could be maintained in such case? ow, that case does not differ from that of an arrest a bill or note, in which the judges do not allow an est, unless the debt sworn to is explicitly shown by affidavit to consist of principal without interest, or less interest is reserved payable on the face of the urity.

ALDERSON B.—Why, on setting aside proceedings irregularity in the affidavit of debt or process, do courts impose a condition on the defendants to bring action? the reason is, that the right to sue as for e imprisonment only accrues to them, upon that ercise of authority by the court. According to the ument for the plaintiff, irregularity in the affidavit hold to bail could never be waived.

GURNEY B. concurred.

Judgment for the defendant.

WELLS *against* ODY.

TRESPASS. The declaration stated, that the defendant heretofore, to wit, on &c., and on divers

In trespass for heightening the plaintiff's wall, whereby lights were obstructed, the defendant pleaded the general issue, and at the trial ed the wall to be a party fence wall within the building act 14 *G*. 3. c. 78. s. 43. that he had built on it in compliance with that act. The plaintiff was nonsuited not having given the defendant 21 days' notice of action, as required by s. 100. e act:—Held, first, that the evidence was rightly received on the general issue, nant to 3 & 4 *W*. 4. c. 42. s. 1.; and secondly, that the nonsuit was right, as acts complained of were not shown to have been done by the defendant in other- than in pursuance of the building act in a bonâ fide manner, and were there- "things done in pursuance of" that act, within s. 100.
Held, also, that treble costs might be taxed to the defendant upon signing the inary judgment of nonsuit, without entering a suggestion on the roll for treble ts, and it is sufficient to enter it at any time before the roll is carried in.

before that time erected and being there, and
and therewith raised, erected, and built a
building upon the said wall of the said plai
kept and continued the said bricks &c., and
other materials and the said building so
and built upon the said wall of the said
as aforesaid, for a long space of time, to w
thence hitherto; whereby the said wall wa
greatly weakened, encumbered and heighte
by reason whereof the light and air which, c
the time aforesaid, of right ought to have ent
come into a certain messuage or dwelling-hou
the appurtenances of the said plaintiff, situate a
near the said wall, have during all the time
been and still are hindered and prevented fro
unto and into the said dwelling-house, with th
tenances of the plaintiff, and the same hath
is, by means of the said trespasses and premi
said, rendered close, uncomfortable, unwholes
unfit for habitation, and the said plaintiff hath
been and still is greatly annoyed and incom
the use, possession, and enjoyment of his said
house with the appurtenances, and other wr
The defendant pleaded not guilty.

The cause was tried before *Gurney* B. at
dlesex sittings after this term. The plaintif

to belong to the plaintiff. The defendant having claimed to give the special matter in evidence under the general issue to which *Gurney* B. acceded (*a*), proved the wall to be a party fence wall, within the building act 14 *Geo.* 3. c. 78., and that he had built on it in compliance with the directions of s. 43. He also contended that he was entitled to 21 days' notice of action by sect. 100, and the plaintiff was nonsuited for want of that proof. *Pratt* v. *Hillman* (*b*) was cited for the defendant.

Bompas Serjt. moved to set aside the nonsuit, and for a new trial. By the new rule of pleading in trespass, *Reg. Gen. Hil.* 4 *Will.* 4. No. V. the general issue in trespass only amounts to a denial that the trespass was committed, not to a denial of the plaintiff's possession or right of property, so that the defence here insisted on could not be set up under that plea. But it was urged, that this being a party fence wall raised according to sect. 43 of the building act, was within its protection, so that the defendant was entitled to 21 days' notice of action under sect. 100. as of an action for a thing "done in pursuance of that act," and that if it was not given, the plaintiff must be nonsuited. But if the defendant was within the protection afforded by the act in this respect, the onus is on him to show that he acted in pursuance of its provisions. [*Alderson* B. Suppose the general issue to have been pleaded in this form, which might be very convenient to be generally adopted, viz. that by virtue of the statute in that case made and provided he is not guilty, thus apprizing the plaintiff that the defendant intends to give the special matter in evidence under a statute saved by 3 & 4 *Will.* 4. c. 42. s. 1. the plaintiff must have proved his title to the wall, as

(*a*) See 3 & 4 *W.* 4. c. 42. s. 1. (*b*) 4 B. & Cr. 269.

Solicitor-General, in arguing that case for th
said, "that section 43 applied only to case
the liberty thereby given can be exercised
interfering with the prior rights of other
section in question concludes by providing
party erecting the wall shall make good ar
that may accrue to the adjoining premise
rebuilding. Suppose the building to have
as could in no possible case be legalized by
account of its blocking up ancient lights, cou
been justified under it? for if it could not, tl
ant would surely not be entitled to notice a
tion under it.

Lord Abinger C. B.—This is not an act
case for blocking up lights, but of trespass
ing on the plaintiff's wall, whereby it is h
and the rays of light are shut out of the plaint
ling-house. Now, if the defendant can jus
the building act, that defence must prevail i
notwithstanding the plaintiff may have sustai
in consequence. The whole question is, wh
100 of the building act applies, and whet
stitutes a defence to an action of trespass,
men of which is nothing but matter of co
damage? Now, suppose that a man who

this statute, should mistake his course or commit some excess, sect. 100 entitles him to notice of action, and to plead the general issue, and give the special matter in evidence. We should altogether fritter away the protection intended by that clause, if we were to hold that the party must bring himself strictly within the act before he could be entitled to it (*a*). This case is analogous to the case of a magistrate, who unwittingly oversteps the authority conferred on him by an act of parliament. *Theobald* v. *Crichmore* (*b*) was an action against a constable for breaking open an outer door, under a magistrate's warrant to levy a church rate. Lord *Ellenborough* said, "It is quite clear that the defendant had no right to break open the outer door, for the purpose of executing his warrant of distress. The question is then, whether he can be said to have acted *in pursuance* of the statute, within the meaning of that term as there used? If it meant only acts *awfully* done under authority of the statute, he would not be protected; but the object was clearly to protect persons acting illegally, but in supposed pursuance of and with a bonâ fide intention of discharging their duty under the act of parliament. The argument goes to show that in every case where the law is exceeded, the officer loses the benefit of the statute; but in those cases only can he require its protection." So in a series of cases on canal acts (*c*), where a particular time for bringing an action has been limited, the courts have held that such limitation applies to cases where

(*a*) See *Beechey* v. *Sides*, 9 B. & Cr. 806.

(*b*) 1 B. & Ald. 227, 229; see *Thomas* v. *Saunders*, 5 B. & Adol. 462.

(*c*) *Lord Oakley* v. *Kensington Canal Company*, 5 B. & Adol. 138; *Fraser* v. *Swansea Canal Navigation Company*, 1 Adol. & Ell. 354; *Blakemore* v. *Glamorganshire Canal Company*, 3 Y. & J. 60. And see on paving and improvement acts, *Butler* v. *Ford*, 3 Tyr. 677; *Burns* v. *Carter*, 5 Bing. 429; *Lloyd* v. *Wigney*, 6 Bing. 489; and on the Commercial Dock company's act, *Smith* v. *Shaw*, 10 B. & Cr. 277.

plead the general issue and give the special m
evidence, according to sect. 100.

Bolland B. concurred.

Alderson B.—Suppose a party to say, I hav
in pursuance of the building act, and claim t
the general issue accordingly, and to give the
matter in evidence, pursuant to *3 & 4 Will. 4*
s. 1. which prevents the judges from deprivin
my right to do so. That plea would put in issue
facts on which the plaintiff seeks to recover, as i
have done before the new rules; so that I agree
Lord *Abinger* that he must prove his possessio
though more should have been proved under th
ral issue, as *e.g.* that the plaintiff had given the
notice of action, it is inconvenient that the
issue should now be pleaded under a statute
comprehensive terms adopted before the new
Perhaps on summons a judge would order a de
to disclose whether or not the general issue
tended to be pleaded under the statute 3 & 4
c. 42. s. 1., so as to compel the plaintiff to prov
averment in his declaration. On considerin
enactment the judges have deemed themselve
without power to regulate the form in which a
issue pleaded under a statute should be framed.

The defendant having afterwards signed final judgment in the general form, the master taxed him treble costs, according to sect. 100 of 14 *Geo.* 3. c. 78. (*a*). A rule was obtained for the master to review his taxation, on the ground that as no justification was pleaded, and judgment had been signed without entering a suggestion on the roll, the plaintiff was only entitled to single costs.

Kelly showed cause. *Collins* v. *Poney* (*b*), and *Pratt* v. *Hilman* (*c*), are precisely in point, and show that the plaintiff having been nonsuited, the defendant is entitled to treble costs, under sect. 100 of 14 *Geo.* 3. c. 78. Nor is it the practice to enter a suggestion on the roll, unless the master entertains any doubt whether treble costs are payable, and therefore requires the defendant to record a suggestion before the costs can be taxed. Except in that instance, treble costs are taxed as in the ordinary case of single costs. It is not sought to set aside any final judgment, and it does not appear that the defendant has signed any. At all events, the suggestion, if necessary, may be entered at any time before the roll is carried in; and the court would enlarge the rule to give time for so doing.

Bompas Serjt. supported the rule. Unless the defendant signs judgment for treble costs, so as to give authority to the master on the record to tax more than single costs, treble costs cannot be taxed. How can treble costs be given under a judgment for costs sustained by the defendant in and about the defending the action? Now *Watchorn* v. *Cook* (*d*) *Calvert* v.

(*a*) See *Charlesworth* v. *Rudgard*, *ante*, 476.
(*b*) 9 East, 322. (*c*) 4 B. & Cr. 269; 6 D. & R. 481, *S. C.*
(*d*) 2 M. & S. 348.

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Everard (*a*) and *Hippesley* v. *Layng* (*b*) show, that after signing final judgment it is too late to enter a suggestion for costs on the roll. The statute enacts by sect. 100, that if the plaintiff become nonsuited, the defendant "shall have judgment to recover treble costs of suit." Then an award of treble costs must appear on the judgment before the defendant can have them. Merely to enter up judgment for treble costs, without showing on the record by entry of a suggestion, that the action was brought for acts done in pursuance of the 14 *Geo.* 3. c. 78. (*c*), or by a judge's certificate, that the party is entitled to them, would be ground for error, *Dunbar* v. *Hitchcock* (*d*). Much less had the master in this case power to proceed to tax them, without seeing on the record the defendant's right to receive more than single costs.

Lord ABINGER C. B.—Assuming that in the case of a nonsuit, the words of the building act make it requisite that a defendant must enter up judgment for treble costs, what is there to show that it must be so entered up before the taxation takes place? The only judgment which at present exists is one of nonsuit; now, whatever has been the scale adopted by the master in taxing costs on it, all that is necessary to justify the judgment of the court is, to enter the requisite suggestion (*e*) at any time before the roll is carried in. For the amount for which final judgment is signed does not appear on the face of that entry of signature, and the court will give such judgment as the defendant is entitled to receive after the costs are taxed. If the defendant signs judgment for costs, and afterwards enters on the roll final j

(*a*) 5 M. & S. 510.
(*b*) 4 B. & Cr. 863.
(*c*) 9 East, 322.
(*d*) 5 Taunt. 820.
(*e*) See Forms, Tidd's Appendix, 5th ed. 391, 392.

for treble costs, specifically, without first entering a suggestion, the plaintiff may have a right to bring error; but if the defendant signs judgment in the ordinary way, and treble costs are afterwards taxed to him, the plaintiff is not injured, for the defendant has only the treble costs to which he was entitled, and the court would grant him leave to enter the suggestion. Now, it would not be erroneous to state on the record, that judgment was given for a named sum for costs, without saying for such costs as the master shall tax, being treble costs. It may be remarked, that the entry of a suggestion is not directed by this act, as is often done by others.

PARKE B.—I have no difficulty in holding that a suggestion might now be entered, on application by the defendant for that purpose. In the cases first cited against the defendant, it was sought to strip the plaintiff of the costs to which he was entitled by the statute of *Gloucester*, under various more recent acts creating courts of requests. In those cases, too, the plaintiffs had been permitted to incur part of the costs in consequence of the defendant's neglect to apply to the court in due time. There, also, the suggestions must have been entered up on the records. Whereas here the judgment would be regular without any suggestion; for if the defendant entered up judgment for the sum which the treble costs to which he is entitled would amount to, calling them costs only, and not treble costs *eo nomine*, the court could not see from it whether he had charged treble costs or not. The cases only show that if a party takes judgment for treble costs, he must state on the record some reason for so taking his judgment. It was argued, in effect, that a judgment for defendant on demurrer to a special plea, setting up a defence of this kind, would be erroneous, if it was not

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for so much for treble costs of suit. Now in *Finlay* v *Seaton* (a) it was held on sect. 21 of the landlord an tenant act, 11 *Geo.* 2. c. 19., the words of which ar " shall recover double costs," that neither a certificat from the judge nor a suggestion on the roll are requisit to entitle a defendant to double costs; a decision whic had the words of this act been exactly similar, woul clearly have covered this case; but it is not necessar to hold whether or not a suggestion must here b entered. In *Dunbar* v. *Hitchcock*, the judgment w for double costs, without any thing to warrant it.

BOLLAND B. concurred.

ALDERSON B.—Treble costs are what the co allows as such, and no more.

Rule discharged, but without costs.

(a) 1 Taunt. 210.

DOE on demise of SHOWELL *against* ROE.

Where part of premises sought to be recovered in ejectment, consisted of three unfinished and uninhabited houses, the affixing declarations in ejectment on the doors of them is not good service, and the right course is to pr vacant possession.

WALLINGER moved for judgment agains casual ejector, the service of the declar being regular as to part of the premises, but another part, the service sworn to was by affi copy of the declaration "on each of the doors c unfinished and uninhabited houses, being the of the premises in the declaration mentione being then no person on the premises."

iff proceed as in the case of a vacant posses-
(*a*) This service cannot be deemed a good ser-

Rule refused as to the latter part.

Under 11 *G.* 2. c. 19. s. 16. and 57 *G.* 3. c. 52.; see *Doe* d. *Lord* ɡ*ton* v. *Cook*, 4 B. & Cr. 259; *Doe* d. *Norman* v. *Roe*, 2 Dowl. 128.

DOE on demise of DRAYCOTT *against* DYOS.

Where, in ejectment, a party defends as landlord, and the tenants in possession give up possession to the agents of the lessor of the plaintiff, that is not ground for discharging a rule for judgment as in case of a nonsuit, except on a peremptory undertaking.

Rule for judgment as in case of a nonsuit had been obtained in an ejectment defended by *Dyos* as ord. It was shown for cause, that the tenants in ssion had some time ago given up possession of premises to an agent of the lessor of the plaintiff, that the agent was still in possession. In support e rule it was answered, that the action being st *Dyos* alone, it is clear that possession has been 1 up collusively by the tenants in possession, d the back of the landlord, which ought not to ve the right of the party defending as landlord right to have his title tried.

e COURT were of that opinion, and said, that the ord was not necessarily to be put to bring an ment.

Rule discharged on a peremptory undertaking.

sby supported the rule. *Whitmore* showed cause.

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WRIGHT *against* NEWTON.

Mrs. *W.* contracted with the defendant for the purchase of the good-will and fixtures of a public-house for 120*l.*, of which 50*l.* was to be paid on a fixed day, if the defendant's landlord consented to the change of tenancy; and on payment of the remainder the defendant was to give up possession to Mrs. *W.* The 50*l.* was paid, and the landlord gave the required consent verbally. Mrs. *W.* came with her furniture to the house, and carried on the business for some time, the defendant, however, still residing there. Before the remaining 70*l.* was paid, and before exclusive possession was given to the defendant, the landlord withdrew his consent;—Held, that the contract being conditional, on the obtaining his consent, and no change of tenancy having taken place before he withdrew it, it must be considered as never having been given; and that the condition not having been performed, the 50*l.* had been paid to the defendant on a consideration which had failed, and might be recovered from him as for much money had and received.

ASSUMPSIT for 50*l.* had and received to the plaintiff's use. Plea: the general issue, non assumpsit; tried before *Alderson* B. at the last *Lancaster* assizes. The facts were these: the defendant was desirous to leave a public-house which he held as tenant, and verbally agreed with the plaintiff to sell to him, on behalf of a Mrs. *Williams*, the good-will and fixtures for 120*l.*, 50*l.* to be payable on a *Monday* after, if *Henshaw* the landlord should consent to the change of tenancy, and possession to be given up on paying the rest. The 50*l.* was paid on the 19th *May* 1834, and on the 20th Mrs. *Williams* was verbally accepted as the new tenant by the landlord. She then went with her furniture to live there, and carried on the business for some weeks. The defendant and his wife also continued to reside there. On 2d *June* the landlord withdrew his consent to take Mrs. *Williams* as tenant, upon which the defendant told her she might keep his name up, and that he would give her possession in spite of the landlord. He suffered her afterwards to take away her furniture, but refused to pay her back the 50*l.*, and afterwards sold the good-will and fixtures to another person, whom the landlord accepted, and was let into possession. In answer to the judge, the jury found that the parties had agreed to rescind the contract, and gave a verdict for the plaintiff. Leave having been given to move to enter a nonsuit,

Crosswell moved accordingly. Unless the contract was rescinded, this money cannot be recovered as had and received to the plaintiff's use, and the declaration should have been special for breach of the contract. Now, there is no evidence to warrant the finding that the contract was rescinded; for the landlord's withdrawing his consent would not be sufficient for that purpose, without the consent of all the parties to the contract. Nor was the defendant's suffering the furniture to go back, evidence of a rescinding the contract, particularly as he refused to repay the 50*l.* *Parke* B. How does it appear that Mrs. *Williams* went in as tenant? She seems to have gone in provisionally only, in case of the landlord's consent being obtained. The defendant did not go out. Then is the landlord bound by the consent given by him in the first instance, without consideration, and could not he retract it on that account before she entered as tenant?] The consideration for the contract had not entirely failed, nor could it have been rescinded after it had been in part performed by payment of the 10*l.*, and taking the goods to the house after the consent given by the landlord in the first instance. [*Alderson* B. I thought the plaintiff had a right to rescind the contract, when the landlord withdrew his consent. I told the jury that he had a right so to alter his mind when he did. Mrs. *Williams*, in fact, removed her furniture to have it ready in the house when *Newton* left. She was not to have possession till the rest of the money was paid, and the licence transferred. Neither of these things was done.] The landlord would be bound by a verbal contract for a future tenancy operating as a tenancy from year to year, though bad as a demise for want of an ascertained commencement. *Parke* B. An agreement for any demise to commence

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in futuro, must be in writing (*a*). This is a demise to begin at a future unascertained period, viz. the termination of the defendant's tenancy. It would have no operation as an agreement for a demise, and was not enough to give an interesse termini (*b*). Was not the whole matter executory till Mrs. *Williams* took possession as tenant? The contract was to be off, if the condition of obtaining the landlord's consent was not performed.] Is not the contract rather to pay down 50*l.* and have a transfer of the house on payment of the rest? Had there been any failure by the defendant to perform the contract, the plaintiff might have maintained the action. It was by her own default that during the interval between the 20th *May* and the 2d *June*, she did not complete the contract, by tendering the residue of the money. That would have entitled her to possession as against the defendant, before the landlord had withdrawn his consent.

PARKE B.—This contract appears to me to have been made between the parties, subject to the condition of the landlord's consenting to the transfer of the tenancy by the defendant to Mrs. *Williams* (*c*). Now, has that condition been performed? The landlord at first assented, and 50*l.* was thereupon deposited with the defendant by Mrs. *Williams*, which it was not intended that she should lose, if from the landlord's withdrawing his consent she did not get into possession as his tenant. Then as the landlord withdrew his consent before the remainder of the money was paid to the defendant, and before he left the house,

(*a*) See *Inman* v. *Stamp*, 1 Stark. C. N. P. 12; and *Ryley* v. *Hicks*, Str. 651. as remarked on by *Bayley* B. *Edge* v. *Strafford*, *ante*, Vol. I. 295.

(*b*) Co. Lit. 46 *b*.

(*c*) It was the defendant's duty to obtain this consent. See *Lord* v. *Crispe*, 5 Taunt. 249.

y had and received to her use. The case re-
self into the question, whether the consent
en by the landlord on the 19th *May* was
on him? I think it was not, and that nothing
nd him till there was an actual transfer of pos-
y the defendant to Mrs. *Williams* as the new
All was in fieri and executory till then. The
nt never left the premises, or handed over the
e possession of them to her.

LAND B.—I entertain a doubt, whether the con-
the landlord as expressed on the 19th *May*,
ot have been sufficient, if Mrs. *Williams* had
n it by paying the residue of the purchase
and obtaining exclusive possession thereupon
nt, before the 2d *June*. But as the consent
ndrawn on that day, before the rest of the
was paid, and before she had possession as
think that there can be no rule.

RSON B.—I retain my opinion that the defend-
er gave to Mrs. *Williams* possession as tenant,
he kept it to secure his receiving the remain-
She moved her furniture prematurely.

Rule refused.

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If an affidavit of sufficiency of bail, accompanying the notice of bail, does not state the place where the property sworn to is to be found, and does not particularize the value of each separate kind, but mixes the whole together, it is a departure from the form given by No. 3, of *Reg. Gen. T.* 1 *W.* 4, and the bail may justify without the defendant receiving the costs of justification.

HOBSON *against* COOPER.

BAIL were excepted to and justified. Pay the costs of the justification was resisted defendant, on the ground that the affidavit sufficiency of the bail, which accompanied the of bail, was not made in pursuance of *Reg. Ge* 1 *Will.* 4, No. 3, the description of the prop the bail being "household furniture and effe good book debts," without stating the place they are to be found, and without affixing the v each description of chattel; whereas the form rule describes the property thus: "Stock in t his business of ——, carried on by him at —— value of ——, of good book debts owing to the value of ——; of furniture in his house a of the value of ——." In the case of *De* bail (a), the bail stated themselves to be posse certain houses without stating their numbers, cupants, and *Taunton* J., without rejecting th fused the costs of justification.

ALDERSON, B.—The rule prescribes that notice of bail shall be accompanied by an affi each of the bail, according to the form there joined, and if the plaintiff afterwards except bail, he shall, if such bail are allowed, pay th of justification, and if such bail are rejected fendant shall pay the costs of opposition, unl court or a judge thereof shall otherwise order. this affidavit does not state the place where the sworn to are to be found, or particularize the v each species of them, but mixes up the whole to so that the object of the rule, viz. the giving th

(a) 1 Dowl. P. C. 368.

e plaintiff from recovering the costs of justifi-

sts for the plaintiff, *Walesby* for the defendant.

LACEY *against* UMBERS.

UMPSIT. The first count stated, that before d at the several times in this count after-men-

A declaration stated that by the usage of racing, it was

, that in all races to be run for, all stakes for sweepstakes should be made e hour of starting for the first race of the day, in cash, bank bills, or banker's able on demand, and be placed in the hands of the person appointed by rd to receive the same, *and in default thereof by any person, he should pay stake as a loser*. The declaration then stated that it being so regulated, ch were appointed to be run, and were run at *L.*, of which one *R. B.* was and one *J. J.* clerk of the races, and that there were at the races certain stakes to be run for, and that a certain filly of the plaintiff, and a certain e defendant, had been nominated for the stakes; that *by a regulation of the ., it was provided that all stakes &c. should be paid to the clerk of the races ven o'clock on the day of running, or the owner should not be entitled though* averment, that the plaintiff had, before the hour of starting, and before clock on the day of running, made and paid his stake into the hands of the e made, and the defendant's colt ran and came in first, and, but for the de- default, would, according to the usage of racing, have been entitled to the es, but that the defendant did not, before the hour of starting for the first day, or before eleven o'clock on that day, being the day of running, make or pay the same into the hands of the clerk of the races. It then averred laintiff's filly did run, and came in second only to the defendant's colt, the plaintiff became liable to pay the whole of the stake, &c.

hat before the defendant had notice of the regulation of the races at *L.*, and hour of starting for the first race of the day, and before the running the

notes payable on demand, and be payabl
hands of the person appointed by the stewar
races respectively to receive the same, and
thereof by any person, he should pay the w
as a loser, whether his horse should come
not, unless such person should have prev
tained the consent of the party or parties v
he was engaged, to his not staking. And
being so regulated by the practice and usage
as aforesaid, heretofore, to wit, on *Wedn*
Thursday the 26th and 27th days of *June* 1
were appointed to be run and were run at
the county of *Salop*, of which races one *R.*
the steward, and one *J. Jones* was the cl
said races, and was then appointed by the sa
to be and was the person to receive all
matches, subscriptions, and sweepstakes to
at the said races. And whereas at the said
tain produce sweepstakes, to wit, sweepstak
produce of mares, at the times of the respe
nations for the said sweepstakes, supposed to
of 50 sovereigns each, were to be and wer
and the produce of a certain mare called *Itty*
certain horse called *Champion*, had been and

for the said sweepstakes, on the ground and for the reason aforesaid other ground or reason whatsoever.

Replication, that the defendant did not tender or offer to make his

nated to run in and for the said sweepstakes, and which produce was a certain colt, at the time of running the said races, the colt of the defendant; and the produce of a certain other mare called *Stella*, by a certain other horse called *Chateau Margaux*, had been and was nominated to run in and for the said sweepstakes, and which produce was a certain filly, at the time of running the said races, the filly of the plaintiff. And whereas by a certain regulation of the said races at *Ludlow* aforesaid, it was further provided, that all stakes, entrance money, arrears, and fees, should be paid to the clerk of the said races before eleven o'clock on the day of running, or the owner should not be entitled though a winner; of which several premises the defendant at the times in this count after-mentioned had notice. And thereupon heretofore, to wit, on the said 26th day of *June* in the year aforesaid, in consideration of the premises aforesaid, and that the plaintiff, at the like request of the defendant, had then promised the defendant in all things to conform to the practice, usage, and regulations aforesaid, he, the said defendant, promised the plaintiff that he would in all things conform to the same. And the plaintiff in fact says that he, confiding in the said last-mentioned promise of the defendant, did afterwards and before the hour of starting for the first race of the day and year last aforesaid, at *Ludlow* aforesaid, and before eleven o'clock on the day of running the said sweepstakes, made his stake, to wit, of 50 sovereigns for his said filly, being such produce as aforesaid for the said sweepstakes, in a bank bill, to wit, of the governor and company of the bank of *England*, and did then pay the same to and into the hands of the said *James Jones*, then being the clerk of the said races and the person appointed by the said steward to receive the same. And the plaintiff further says, that the said defendant's said colt, being such pro-

that the defendant did not nor would, before
of starting for the first race, on the day and
aforesaid, at *Dudley* aforesaid, or before or
on that day, being the day of running the all
stakes (although requested by the plaintiff
and although he had not then obtained, nor
obtain the plaintiff's consent to his not stak
his stake, to wit, of 50*l.* for his said colt,
produce as aforesaid, for the said sweepstake
bank bills, or bankers notes, payable on de
otherwise, or pay the same to or into the han
said *Jones*, then being the clerk of the
and the person appointed by the said ste
ceive the same. And the plaintiff further
his said ally did run for the said sweepstakes
come in second and next only to the said
defendant, whereby and according to the said
usage, and regulations, and his promise afor
defendant then became liable to pay the wi
said stake, to wit, the said sum of 30*l.* to hi
on request, whereof the defendant afterwar
on the day and year last aforesaid, had notice
then and often since requested by the plaint
him the said sum of 30*l.* according to the said
usage, and regulations, and his promise last
Yet he hath wholly disregarded his promise

declaration that before the said defendant had notice of the said regulation of the said races at *Ludlow*, in the said first count mentioned, and before the said defendant was requested by the said plaintiff to make his said stake as in that count mentioned, and before the hour of starting for the first race of the day whereon the said race in the said first count mentioned was run, and before the running of the race for the said sweepstakes in the said first count mentioned, he, the said defendant, was ready and willing and then offered to make his stake of 50*l.* in the said first count mentioned, for his said colt for the said sweepstakes in that count mentioned, in bankers' notes, payable on demand, and then tendered and offered to pay the said stake in such bankers' notes into the hands of the said *J. Jones*, but the said *R. Betton* then refused to allow the said *J. Jones* to accept or receive the said defendant's said stake, or to allow the said defendant's said colt to run for the said sweepstakes, on the ground that the said colt was disqualified to run for the said sweepstakes; and the said *J. Jones* did accordingly, in consequence of such refusal of the said *R. Betton*, then refuse to accept or receive from the said defendant his said stake, and did refuse to allow the said defendant's said colt to run for the said sweepstakes, on the ground and for the reason aforesaid, and on no other ground whatsoever, of all which premises the said defendant, before the commencement of this suit had notice. Verification.

Similiter to first plea. And replication as to the last plea of the defendant as to the said first count, that the defendant did not tender or offer to make his stake of 50*l.* in the said first count mentioned, or to pay the same to or into the hands of the said *J. Jones*, until long after eleven o'clock on the day of running the said sweepstakes (although before and at that hour he had

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notice of the said regulation of the said races low.) Verification.

Demurrer, stating for causes that the said tion to the said second plea of the said de tenders an immaterial issue, and also for that t is a departure from the said declaration of t plaintiff, and does not fortify or strengthen th and also for that the said plaintiff hath not in replication to the said second plea of the said ant traversed or denied any material facts all the said defendant's said second plea, and al Joinder.

R. V. Richards in support of the demurrer. sufficient for the defendant to pay or offer to stake, on or before the hour of starting for the fi of the day on which the produce sweepstakes be run for, in order to save himself from los stake. [*Parke* B. By the general usage of the defendant, who did not pay his stake bef hour of starting for the first race, would not o win the stakes if his horse came in first, bu have to pay his stake as a loser. Now by the regulation, if he did not pay before eleven o'cl would not be entitled to the stakes if his hor But there is no provision that he should pay his stake as a loser.] *R. V. Richards* was stopped court.

G. T. White supported the replication. Th regulation is in substance the same as the gene of the jockey club. [Lord *Abinger* C. B. The regulation, requiring the party to pay his stake eleven o'clock, only prevents him from winni stakes, though his horse comes in first, if he h so paid his stake; but to make him pay his st

that case as a loser, we must resort to the general regulation, which provides that he must have refused or failed to pay the stake before the hour of starting for the first race of the day on which the sweepstakes were run for.]

The *Ludlow* regulation substitutes eleven o'clock, instead of the hour of starting for the first race of the day.

[Lord *Abinger* C. B. Then your replication is a departure from the declaration; for in the declaration you have made the hour of starting for the first race of the day material, yet in the replication you allege, that he did not tender or offer to make his stake of fifty sovereigns, or to pay the same, till after eleven o'clock; without adding that he had not paid or offered to pay before the hour of starting. By that, instead of fortifying the declaration, you would seem to contend that if he does not pay the stake before eleven o'clock he is still bound to pay as a loser.] The replication fortifies the declaration, by showing that the tender pleaded was a bad one, not being pleaded in time. [*Parke* B. If the replication is not a departure, on the ground that eleven o'clock was substituted for the hour of starting for the first race, the replication does not state any cause of action, so that the objection is open on general demurrer; and if the defendant has not a right to receive the stakes though his horse came in first, he has not lost his stake to the plaintiff. I am clearly of opinion that the terms, of not being entitled though a winner, cannot mean the same thing as paying the whole stake as a loser. *Alderson* B. The defendant's horse might have run to save the loss of his stake.] The point now suggested by the court as open on general demurrer is not set forth in the margin of it according to the new rule.

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[*Parke* B. That does not signify, as the omiss afforded ground for moving to strike out the de

Judgment for the defen

WILLIAMS *against* GRIFFITHS.

The plaintiff occupied land under the defendant at a yearly rent, and at the defendant's request became his farming bailiff in the place of another person who had received 12*s.* a-week while so employed. The plaintiff continued in the service nearly 13 years without receiving wages or paying rent, and then sued for the balance of his wages for all that time, after deducting the rent: Held, that though this might be such an open account as would have taken the case out of the statute of limitations 21 *Jac.* 1, c. 16, and the learned judge being of that entitled to recover wages for six years, there being no part-payment any thing equivalent to it or to satisfaction by agreement between the parti

ASSUMPSIT, for wages, work and labo
[illegible] and for money due on an
stated account: non assumpsit and the statute
tations. Replication, that the several causes o
accrued within six years.

At the trial before *Williams* J. at the last
Chelmsford assizes, the action appeared to hav
brought to recover 205*l.* for wages and service
fore *March* 1821, the plaintiff had rented p
from the defendant at the annual rent of 16*l.*,
built walls for him. On 25th *March* 1831,
proposed by the defendant, and agreed by the
that the plaintiff should become the defendant
ing bailiff, in lieu of a man who had been
situation at 12*s.* a week. The plaintiff ente
service, and continued in it for about thirtee
without having ever paid rent or received
There were items due for rent on one side, a
on the other, nearly to the period of commenc
action. It was objected for the defendant, t
was no open account between the parties,
take the case out of the statute of limitations,
1. c. 16, and the learned judge being of that
[illegible] accordingly [illegible] to 14*l.* [illegible]
[illegible] 46. s. 3. yet [illegible] since [illegible]

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directed a verdict for the plaintiff for 85*l.* 19*s.* 9*d.* for materials found and provided within six years, giving him leave to move to increase it to 205*l.* 12*s.* 11*d.*, if the court should hold that the plaintiff's claim of the difference between the two sums was not barred by the statute of *James.*

Chilton moved pursuant to the leave reserved. This is a case of importance as affecting long mutual dealings. It was a running account, on the side of which were the services done by the plaintiff, and, on the other, the rent due to him from the defendant; so that every new dealing on either side was an acknowledgment of a prior existing debt. *Catling* v. *Skoulding* (*a*) applies. In that case, as in the present, one side of the account consisted of items of rent accruing due down to a period within six years before the writ sued out, and the other contained some items of the defendant's set-off for goods sold and delivered to the plaintiff, to within a similar period. It was there held, that if there be a mutual and running account of any sort between a plaintiff and defendant for any item of which credit has been given within six years, that is evidence of an acknowledgment of there being such an open account between the parties, and of a promise to pay the balance, as will take the case out of the statute of limitations, 21 *Jac.* I. c. 16, s. 3. Lord *Kenyon* says, "Here are mutual items of account, and I take it to have been clearly settled, as long as I have any memory of the practice of the courts, that every new item and credit in an account given by one party to the other is an admission of there being some unsettled account between them, the amount of which is afterwards to be ascertained; and any act which the jury may consider

(*a*) 6 T. R. 189; Peake's N. P. C. 127; see 2 Saund. 124. 127 *a.* n.

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as an acknowledgment of its being an open account is sufficient to take the case out of the statute." The present case is stronger than *Crank* v. *Kirkman*, decided by Lord *Kenyon*, and cited in *Catling* v. *Shoulding* (a). [*Parke* B. Since Lord *Tenterden's* act, 9 *Geo.* 4. c. 14., are you not driven to contend that this was equivalent to part-payment, in order to take the case out of that statute?] It is there enacted, that no acknowledgment or promise "by words only" shall be evidence of a "new or continuing contract," so as to deprive any party of the benefit of the statute. Now this is not an acknowledgment or promise by words only, but implied in law from the acts of the parties. [*Parke* B. You might have shown an agreement between the parties, that the rent should go in part-payment for the labour, so as to have enabled the plaintiff to recover the balance due for the latter. To take it out of Lord *Tenterden's* act, you ought to have shown something equivalent to part-payment or satisfaction by agreement between the parties.] These facts afford an equivalent to part-payment, for, to use the argument of *Le Blanc* and *Wilson* in *Catling* v. *Shoulding*, which was adopted by the court in their judgment, "each article of the account on one side was equivalent to a part-payment of the bill on the other, and a promise to pay the balance;" nor was any express agreement to set the rent against the goods furnished there proved. [*Parke* B. Neither in this case nor in that cited is there a replication of merchant's accounts, but the general one, that the action accrued within six years.] This replication is sufficient, for the plaintiff's claims extend down to a short time before the action commenced. Where there have been mutual current and unsettled dealings and

(a) 6 T. R. 191 n.

ccounts between the parties, and any of the items are ithin six years, the plaintiff, to a plea of the statute hat the defendant did not promise within six years, ay reply generally that he did; and the reason seems o be, because the mutual accounts between the parties or any item of which credit has been given within six ears, are of themselves evidence of there being such n open account, and of a promise to pay the balance; n which account that sort of evidence is as proper on he issue of *non assumpsit infra sex annos* as any other vidence of an acknowledgment of the debt by the efendant, or of his promise to pay it. See *Webber* v. *Trill* (a).

PARKE B.—The defendant's putting down an item o the plaintiff's debit, and not asking for it, amounts o his saying, I do not call on you for it, because I know ou have a cross-demand on me. They might have mutually agreed that neither should call on the other for payment of the money due to him, but that the debt due from one should be taken in payment for that due from the other. Before Lord *Tenterden*'s act that would have sufficed as an acknowledgment to take the case out of the statute 21 *Jac.* 1. c. 16. on the ground that the acts of the parties were equivalent to an acknowledgment of and promise to pay the debt. But it seems to me, that since 9 *Geo.* 4. c. 14., there must be at least something equivalent to part-payment of principal or interest.

BOLLAND B.—Before Lord *Tenterden*'s act, the plaintiff's argument would have prevailed; but part-payment, or something equivalent, is now necessary.

ALDERSON B.—The true question was, whether

(a) 2 Wms. Saund. 127 *b.* notes (6) and (7).

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there was a part-payment or not; and that is of by the facts.

GURNEY B. concurred.

Rule

REX *against* ARMSTRONG, Clerk, in a

SWANN *against* ARMSTRONG.

A sheriff returned to a *capias utlagatum* on mesne process, that the defendant had no goods nor any lay-fee in his bailiwick, but had a rectory, without stating that he had seized it into his hands. The court awarded a *sequestrari facias*, in order that the plaintiff might obtain his debt out of profits paid into the treasury.

TOMLINSON moved that a writ of sequest of the defendant's rectory should issue, d the bishop of the diocese in which it lay. A ape *utlagatum* having issued against him on mesn it was returned by the sheriff that the defen no goods or lay-fee within the bailiwick, but of a parish named, without alleging that he seized the rectory into his hands. [Par living was not forfeited on the outlawry. Ho sequestrate before judgment is obtained?] case of the outlawry of *Hind*, clerk (a), return was made, and this court granted tration on reading the transcript of the ca *gatum*, with the return and the inquisition.

Per Curiam (b).—That authority removes culty. The writ may issue, for the profits of sequestrated under it will belong to the cro paid into the treasury. The plaintiff may for such portion as he can show himself entit

Writ

(a) *Ante*, Vol. I. 347.

(b) Lord *Abinger* C.B., *Parke*, *Bolland*, and *Gurney* B. *Powell*, *Easter* term, 1836. Tyr. & Gr. in the press.

1835.

BALL *against* CULLIMORE, THOMAS WITHERS, and Others.

A tenancy at will is determined by the lessor's execution of a feoffment with livery of seisin indorsed, followed up by livery of seisin to the feoffee made by the lessor's attorney on the land, though at the time the livery was so made, the tenant at will was off the land, and had had no notice of the determination of the will.

TRESPASS for breaking and entering the plaintiff's close, and pulling down buildings there, and ejecting him from possession. Pleas, (before the new rules,) first, not guilty; secondly, soil and freehold in *H. Howard*, and issues thereon.

At the trial before *Alderson* B. at the *Gloucestershire* summer assizes in 1834, it appeared that one *Richard Withers* had inclosed the *locus in quo* from the waste more than thirty years before, and remained in quiet possession till about 1828, when he verbally agreed to sell it to his son, the defendant *Thomas Withers*, for 5*l.* and let him into possession. Only part of the money being paid, the father, *R. Withers*, agreed at the plaintiff's request to sell him the land for 5*l.*, which was accordingly paid. On 21st *March* 1831, *Richard Withers* executed a deed of feoffment of the *locus in quo*, with livery of seisin indorsed, stating it to be in the possession of *Thomas Withers*, tenant to the said *R. Withers*. On the 25th *March* in the same year, the feoffor's attorney went with plaintiff, the feoffee, in order to make livery of seisin to the plaintiff, and having cut a sod, which he delivered to him, left him in possession. They saw the defendant *T. Withers* leave the ground just before they entered it. He continued to assert his title to it by various acts of ownership, and attempted to regain possession down to the commencement of the action. The trespasses declared on took place in June 1832. The judge asked the jury whether the defendant, *T. Withers*, left the ground in order to give up possession, and they found that he

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GURNEY B. concurred.

Rule ref

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TOMLINSON moved that a writ of *sequestra* of the defendant's rectory should issue, dir the bishop of the diocese in which it lay. A speci *utlagatum* having issued against him on mesne It was returned by the sheriff that the defend no goods or lay-fee within the bailiwick, but w of a parish named, without alleging that the sh seized the rectory into his hands. [*Parke* living was not forfeited on the outlawry. How sequestrate before judgment is obtained?] case of the outlawry of *Hind*, clerk (a), th return was made, and this court granted a tration on reading the transcript of the *capi gatum*, with the return and the inquisition.

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BALL *against* CULLIMORE, THOMAS WITHERS, and Others.

A tenancy at will is determined by the lessor's execution of a feoffment with livery of seisin indorsed, followed up by livery of seisin to the feoffee made by the lessor's attorney on the land, though at the time the livery was so made, the tenant at will was off the land, and had had no notice of the determination of the will.

TRESPASS for breaking and entering the plaintiff's close, and pulling down buildings there, and ejecting him from possession. Pleas, (before the new rules,) first, not guilty; secondly, soil and freehold in *H. Howard*; and issues thereon.

At the trial before *Alderson* B. at the *Gloucestershire* summer assizes in 1834, it appeared that one *Richard Withers* had inclosed the *locus in quo* from the waste more than thirty years before, and remained in quiet possession till about 1828, when he verbally agreed to sell it to his son, the defendant *Thomas Withers*, for 5*l.* and let him into possession. Only part of the money being paid, the father, *R. Withers*, agreed at the plaintiff's request, to sell him the land for 5*l.*, which was accordingly paid. On 21st *March* 1831, *Richard Withers* executed a deed of feoffment of the *locus in quo*, with livery of seisin indorsed, stating it to be in the possession of *Thomas Withers*, tenant to the said *R. Withers*. On the 25th *March* in the same year, the feoffor's attorney went with plaintiff, the feoffee, in order to make livery of seisin to the plaintiff, and having cut a sod, which he delivered to him, left him in possession. They saw the defendant *T. Withers* leave the ground just before they entered it. He continued to assert his title to it by various acts of ownership, and attempted to regain possession down to the commencement of the action. The trespasses declared on took place in *June* 1832. The judge asked the jury whether the defendant, *T. Withers*, left the ground in order to give up possession, and they found that he

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WILLIAMS v. GRIFFITHS.

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GURNEY B. concurred.

Rule refused.

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TOMLINSON moved that a writ of *sequestrari facias* of the defendant's rectory should issue, directed to the bishop of the diocese in which it lay. A special *capias utlagatum* having issued against him on mesne process, it was returned by the sheriff that the defendant had no goods or lay-fee within the bailiwick, but was rector of a parish named, without alleging that the sheriff had seized the rectory into his hands. [*Parke* B. This living was not forfeited on the outlawry. How can you sequestrate before judgment is obtained?] In the case of the outlawry of *Hind*, clerk (*a*), the usual return was made, and this court granted a sequestration on reading the transcript of the *capias utlagatum*, with the return and the inquisition.

Per Curiam (*b*).—That authority removes our difficulty. The writ may issue, for the profits of the living sequestrated under it will belong to the crown, and be paid into the treasury. The plaintiff may then apply for such portion as he can show himself entitled to.

Writ granted.

(*a*) *Ante*, Vol. I. 347.

(*b*) Lord *Abinger* C. B., *Parke*, *Bolland*, and *Gurney* Bs. See also *Powell*, *Easter* term, 1836. Tyr. & Gr. in the press.

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SWANN *against* ARMSTRONG.

A sheriff returned to a *capias utlagatum* on mesne process, that the defendant had no goods nor any lay-fee in his bailiwick, but had a rectory, without stating that he had seized it into his hands. The court awarded a *sequestrari facias*, in order that the plaintiff might obtain his debt out of profits paid into the treasury.

TOMLINSON moved that a writ of *sequ* of the defendant's rectory should issu the bishop of the diocese in which it lay. A *utlagatum* having issued against him on me it was returned by the sheriff that the de no goods or lay-fee within the bailiwick, b of a parish named, without alleging that th seized the rectory into his hands. [*Pa* living was not forfeited on the outlawry. sequestrate before judgment is obtained case of the outlawry of *Hind*, clerk (*a* return was made, and this court grante tration on reading the transcript of the *gatum*, with the return and the inquisition.

Per Curiam (*b*).—That authority remo culty. The writ may issue, for the profits sequestrated under it will belong to the c paid into the treasury. The plaintiff ma for such portion as he can show himself en

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BALL *against* CULLIMORE, THOMAS WITHERS, and Others.

A tenancy at will is determined by the lessor's execution of a feoffment with livery of seisin indorsed, followed up by livery of seisin to the feoffee made by the lessor's attorney on the land, though at the time the livery was so made, the tenant at will was off the land, and had had no notice of the determination of the will.

TRESPASS for breaking and entering the plaintiff's close, and pulling down buildings there, and ejecting him from possession. Pleas, (before the new rules,) 1st, not guilty; secondly, soil and freehold in *H. Howard*; and issues thereon.

At the trial before *Alderson* B. at the *Gloucestershire* summer assizes in 1834, it appeared that one *Richard Withers* had inclosed the *locus in quo* from the waste more than thirty years before, and remained in quiet possession till about 1828, when he verbally agreed to sell it to his son, the defendant *Thomas Withers*, for 5*l.* and let him into possession. Only part of the money being paid, the father, *R. Withers*, agreed at the plaintiff's request to sell him the land for 5*l.* which was accordingly paid. On 21st *March* 1831, *Richard Withers* executed a deed of feoffment of the *locus in quo*, with livery of seisin indorsed, stating it to be in the possession of *Thomas Withers*, tenant to the said *R. Withers*. On the 25th *March*, in the same year, the feoffor's attorney went with plaintiff, the feoffee, in order to make livery of seisin to the plaintiff, and having cut a twig, which he delivered to him, left him in possession. They saw the defendant *T. Withers* leave the ground just before they entered it. He continued to assert his title to it by various acts of ownership, and attempted to regain possession down to the commencement of the action. The trespasses declared on took place in *June* 1832. The judge asked the jury whether the defendant, *T. Withers*, left the ground in order to give up possession, and they found that he

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did not, and that he held on adversely to the plaintiff. The learned judge thereupon was of opinion that he was in possession, and that the feoffment did not operate to give the plaintiff a valid title. Verdict for the defendants, with leave to the plaintiff to move to enter a verdict for 15*l.*, if this court should be of opinion that the feoffment determined the tenancy at will. In last *Michaelmas* term, *Ludlow* Serjt. moved according to the leave reserved, and contended that the merely equitable interest of the defendant *T. Withers* could not subsist as against the plaintiff's right under the feoffment with livery of seisin, and cited *Doe* d. *Moore* v. *Lawder* (*a*). [Lord *Lyndhurst* C. B. Strictly speaking, the son would at law be tenant at will only, though he might have lived on the premises for ever so long a time.] The rule having been granted,

Maule, *R. V. Richards* and *Lumley* showed cause. The sale to the plaintiff was void, being after the sale by the father, *R. Withers*, to his son the defendant *T. Withers*, and after possession taken by the latter. For that possession was lawful, though no conveyance was executed; and till it was determined in a proper manner by demand of possession or wrongful act of the son, the father could not sell or convey the land. The subsequent sale by him, though enforced by feoffment, amounted to champerty, being the sale of a mere title, contrary to 32 *Hen.* 8. c. 9 (*b*). Then, the possession of the plaintiff was not lawful, for he acquired no title under the feoffment. [Lord *Abinger* C. B.

(*a*) 1 Stark. C. N. P. 308. See Lit. s. 59; Co. Lit. 48 a, 330 b; West Inst. 230; *Bettesworth*'s case, 3 Rep. 31, 32; *Kirtland* v. *Pounsett*, 2 Taunt. 145; *Doe* d. *Read* v. *Taylor*, 2 N. & M. 508; Bro. Abr. tit. Feoffment de Terres, pl. 80; *Doe* d. *Maddock* v. *Pynes*, 3 B. & Cr. 388.

(*b*) See Co. Lit. 369 a; 15 Vin. Ab. 154; 2 Roll. Rep. 201.

he admitted the receipt of part of the pur-
ney, he admitted only an equitable title in the
arte B. At law the defendant *Withers* was
not adversely, but as a mere tenant at will to
r. That appears from the evidence of the
on between them. Then that tenancy was
title (*a*); and in *Co. Lit.* 55 *b.* it is laid down,
e lessor comes on the land, he may determine
the absence of the lessee; and though *Right*
l (*b*) shows that a tenant's entering into the
consent rule in ejectment, will not amount
tructive adoption of the lease to the nominal
as to operate as a determination of the will by
of the plaintiff, still, if the lessor enters on
and makes a feoffment with livery, that will
his will, *Com. Dig.* tit. *Estates* (H 6.) (*c*),
act done on the land, and taken by the law
ally notorious whether the tenant is absent or
The tenant then ceases to have any in-
the land.] It is contended that the son
gally claim title against the plaintiff, the
or the son's possession, if not adverse, was
d could only be determined by demand of
by his father; *Right* v. *Beard.* But he
dversely, and was treated accordingly. It is
C. B. *Comyns* lays down (*d*), that if livery be

ground, had received no demand of poss
knew nothing of the lessor's act behind his
original authority in *Dyer* is loose, and doe
that the tenant at will in that case was not
what took place. The lessor could not
ment without first demanding possession;
Herbert (b); *Right* v. *Beard*. Then how co
such a legal entry as would entitle him to m

Lord ABINGER C. B.—A tenancy at wil
scintilla of interest which justifies the posse
tenant, but requires no more than a me
of possession to determine it; but it is cert
entry of the lessor, and making a feoffment
on the land, will have that effect, whether
was there or not. No doubt that the defend
had been put into possession under a con
father to sell the land to him, but we cannot
consideration of the son's equitable intere
only proceed on his legal title, a tenancy at
way of determining the will would have
lessor to maintain ejectment. Now a feof
by him, with livery of seisin on the land,
act, which would determine his will; for
rule is, that any act done on the land by t
assert his title to the possession, will have

ant *Withers* was a mere tenant at will, for by the act of his father, the vendor, he had a right to the possession, but nothing more. Then when the father came on the land, executed a feoffment to the plaintiff, and gave him livery of seisin, that entry determined the will, whether the tenant knew it or not, and passed the premises to the plaintiff, who thus acquired a good title, so that the defendant, who entered afterwards, was a trespasser.

BOLLAND B.—I have no doubt upon the authorities but that the plaintiff's title was a good one, and that the defendant *Withers* had therefore no right to enter it. The verdict must be entered for the plaintiff for 15*l.*

ALDERSON B. concurred.

Rule absolute.

Ludlow Serjt. and *W. J. Alexander* were to have supported the rule.

GARDINER *against* WILLIAMS.

CASE, for libel. The declaration, after the usual inducement of the plaintiff's good character, stated

Case for libel. The following matter was

that the defendant in relation to *P.* (meaning the defendant) have reason to suppose that many of the *flowers* of which I (meaning the defendant) have been robbed are *growing* upon your premises, (thereby meaning that the plaintiff had been guilty of larceny, and had stolen from the defendant certain *plants, roots,* and *flowers* of the defendant, and had disposed of them unlawfully to *P.*, and unlawfully placed them in the garden of the last mentioned person.") The case went to trial and the plaintiff had a verdict. Upon motion in arrest of judgment, on the grounds that the innuendo unduly enlarged the sense of the word "flowers" by extending it to "plants and roots," and that larceny could not be committed of growing flowers, except after a summary conviction for the same offence under 7 & 8 *G.* 4. c. 29. s. 42: Held, that the count was good, for after verdict the court would contend that the libel had been shown at the trial to mean such flowers as might be the subject of larceny, either under, or notwithstanding the restriction of 7 & 8 *G.* 4. c. 29.; and that flowers described to be "growing" in a garden must include their plants and roots.

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that the said plaintiff had not ever been guilty, or until the time of the committing of the several grievances by the said defendant, as hereinafter mentioned, been supposed to have been guilty of larceny, or of other the offences and misconduct hereinafter mentioned, to have been imputed to and charged upon the said plaintiff, or of any other such offence or misconduct, by means of which said premises, the said plaintiff, before the committing &c., had deservedly obtained the good opinion and credit of all his neighbours, and other good and worthy subjects of this realm to whom he was in anywise known: and whereas also, before the committing of the said grievances &c., he the said plaintiff had been in the service and employ of one Mrs. *Nicholls* as a gardener, and having left the said service and employ, had become, and at the time of the committing of the said grievances, was the servant and gardener of one *C. A. Pierce*; yet the said defendant, well knowing the premises, but greatly envying, &c., and wickedly and maliciously intending to injure the said plaintiff in his said good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace with and amongst all his neighbours, and other good and worthy subjects of this kingdom, and to cause it to be suspected and believed by those neighbours and subjects, that he the said plaintiff had been and was guilty of larceny and other dishonest and unlawful practices, and to subject him to the pains and penalties by the laws of this kingdom made and provided against and inflicted upon persons guilty of larceny, and to cause him to lose and be deprived of his said place and situation of servant and gardener, as last aforesaid, and to vex, harrass, oppress, impoverish, and wholly ruin him the said plaintiff, heretofore, to wit, on &c., wickedly and maliciously did compose and publish, and caused and procured to be published, of and con-

amongst other things, the false, scandalous, s, defamatory, and libellous matter following, concerning the said plaintiff, and of and con- him in his said business and employment of a o, that is to say, "Sir, (meaning the said *C. A.* s I (meaning the said defendant) believe you g the said *C. A. Pierce*) were perfectly aware o gardener (meaning the said plaintiff) whom aning the said *C. A. Pierce*) are employing charged from the service of Mrs. *Nicholls* g the said Mrs. *Nicholls*) and myself (meaning defendant) for his (meaning the said plain- ishonesty, (meaning that the said plaintiff had ity of dishonesty and unlawful practices in his iness and employment as gardener,) and I g the said defendant) have reason to suppose y of the flowers of which I (meaning the said nt) have been robbed, are growing upon your , (thereby meaning that the said plaintiff had ity of larceny, and had stolen from the said nt certain plants, roots, and flowers of the said nt, and had disposed of them unlawfully to the *A. Pierce*, and unlawfully placed them in the of the said last-mentioned person,) may I g the said defendant) beg to know when it will quisit for you (meaning the said *C. A. Pierce*)

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At the trial before Lord *Abinger* C. B. at the tings in *Middlesex* after his return, *Pierce* proved he received the letter, and that it was not in any any letter addressed by him to the defendant reflec the plaintiff's character. This Lord *Abinger* held not to be a privileged communication (*a*). Ve for the plaintiff. *Maule* moved in this term to a the judgment on two grounds; first, that the no imputed to the plaintiff did not amount to larcen laid in the declaration; secondly, that the innuendo sought to enlarge the sense of the flowers, by applying it to *all* plants and roots.

Thesiger and *Addison* showed cause. First declaration shows an imputation of an offence ing to larceny. For though the statute 7 & 8 G c. 29. s. 42. provides that the stealing any plant, or vegetable production, *growing* in any garden shall subject the offender, on conviction before j tice, to imprisonment, with or without hard labo his discretion; it is not till a second conviction the offence by a party previously convicted, amounts to a felony. Nothing in the libel show the imputation in it was intended to be confined or roots *growing* in the defendant's garden, and fore within the above enactment. Many flowers are kept out of the ground during a part of the as dahlias, tulips, &c., and as the declaration do state the plants to be growing in *Pierce's* garden time of their being carried away, it is quite con with it that they were taken up from the defend ground before the plaintiff carried them awa charged. [Lord *Abinger* C. B. There may be

(*a*) See *Pattison* v. *Jones*, 8 B. & Cr. 578; *Rogers* v. *Clifton*, 3 Pal. 587, 592, and 595; *Child* v. *Affleck*, 9 B. & Cr. 403; *Te Spyring*, 4 Tyr. 582; *Brooks* v. *Blanshard*, 3 Tyr. 844.

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which may be the subject of larceny, flowers kept in houses in flower-pots in a portable state, though with earth attached, and if there be any such case, the question would after verdict be good. I do not think the rule will be granted. The ground that the offence charged on the plaintiff did not amount to larceny, but is a doubtful one, whether the innuendo was not too large in attributing an intention to impute to the defendant the stealing plants and roots as contradistinguished from flowers, for example, carrots, potatoes, or cuttings, in flowers only were mentioned in the defendant's letter. The innuendo is warranted by the wording of the letter, for the word "flower" signifies not merely the growing parts of the plant, but the plant itself, which is spoken of as "growing" in Pierce's garden. Now a flower to be growing must be a plant, and have a root, so that the words "plants and roots" were here justified in the innuendo by the word "flowers." Lord Bacon, in his Essay "Of Gardens," says, "I like little heaps in the nature of molehills, such as are in wild heaths, to be set some with wild thyme, some with pinks, some with germander, that gives a good flower to the eye, some with perriwinkle, some with violets, some with strawberries, some with cowslips, some with daisies, some with lilium convallium, some with sweet-williams red, some with bear's foot, and the like low flowers, being withal sweet and sightly." Here the words "low flowers" clearly embrace plant and root as well as flower. But rejecting the innuendo for its ingenuity, there is enough in the libel itself to support the verdict (d).

(d) On the motion for the rule, Alderson B. had pointed out that the former part of the libel imputed dishonesty to the plaintiff, so as to be actionable per se, and that had the point as to the innuendo been mentioned at the trial, the chief baron might have amended the declaration by striking it out.

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Wightman in support of the rule. The judgment must be arrested, for the defect in the innuendo being that of enlarging the sense of the alleged libel, cannot be cured by the verdict for general damages on all the counts. First, since 7 & 8 *Geo. 4. c.* 29. s. 42., larceny cannot be committed of "flowers," except after a summary conviction for a like offence. By analogy to the presumption as to animals when named in an indictment (a), flowers must be taken to mean living flowers. Here too they must be living, being said to be growing in *Pierce*'s garden. Secondly, in the absence of all introductory averments that there were certain matters the subject of larceny, the argument that flowers are plants and have roots will not cure the innuendo, for if "plants, roots, and flowers" may include many things which "flowers" cannot, it is bad for enlarging the sense of that word, and thus introducing new matter which should have been made part of the inducement, and afterwards referred to by the innuendo. *Day* v. *Robinson* (b) applies. There a count alleged the words thus: "You have robbed me of one shilling, tan money;" which was explained by the innuendo to mean that the plaintiff had fraudulently taken and applied to his own use the sum of one shilling received by him for the defendant, being the produce of some tan sold by the plaintiff as the servant of the defendant. There was no prefatory averment in the declaration with which these facts were connected, and the court of Exchequer Chamber held that the innuendo was bad for introducing new facts, without which the words charged were not in themselves actionable.

Lord ABINGER C. B.—I have already answered the first objection taken in arrest of judgment, viz. that if

(a) See *Rex* v. *Edwards*, R. & R. 497; *Rex* v. *Pucherine*, R. & 242.

(b) 1 Ad. & Ell. 354. in error from the court of King's Bench.

offence of larceny cannot be committed with regard to flowers, by putting cases in which a larceny of flowers may be committed, independently of the statute. Many other like cases may be suggested, as in the instance put at the bar, of flower roots taken up and kept out of the ground during the winter, in order to plant them again in the spring; or laying on the ground to get dry, &c. &c. Now the existence of a single instance of the kind would support the declaration after the verdict, which we must now presume to have proceeded on proof of some such case.

PARKE B.—After verdict the court will intend that the imputation proved at the trial was shown to apply to such flowers as might be the subject of larceny by the plaintiff. The word, as here used, clearly applies to flowers capable of being planted in another garden, and of growing there, though not described to be growing at the time. It must therefore include as well the plant and root of the flower as the stem and blossom itself, and must be taken to mean those flowers with plants and roots to them, which would be subjects of larceny when detached from the earth, and lying loose in order to be planted again. But if the innuendo is too large, the rest of the matter in the libel would sustain the action.

BOLLAND B.—The word "flowers" in the libel is by no means inconsistent with the presumption we are bound to make in support of this verdict. Suppose a man to steal in winter a plant capable of flowering, but laying in a green-house at the time with its roots, and to plant it. Suppose it to grow and flower, and the owner to see it and say, "That is the flower *A. B.* stole from me," would he not mean to include the plant and root as well as the bloom or flower? Any such

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case must in this stage of the cause be pre
support of this verdict.

Rule discharg

(a) A writ of error was sued out, and the notice of allowance
statement of errors, being the same objections which had
arrest of judgment; adding, that the libel was not laid to be publ
plaintiff in his trade as gardener. The court refused leave to
issue execution, under *Reg. Gen. Hil.* 4 *W.* 4. No. 9., notwithst
allowance, on the ground that the errors assigned were involved
the libel to have been published concerning the plaintiff in his
fused to impose any terms on the defendant. *S. C.* in error Tyr.

COATES *against* STEVENS.

Assumpsit for 30*l.*, the balance of an account of 40*l.* Pleas, first, to the whole declaration, payment of 27*l.* 4*s.* 4*d.* into court, and averring that the plaintiff had sustained damages to a greater amount; secondly, non assumpsit, except as to 27*l.* 4*s.* 4*d.*; thirdly, payment of 10*l.* before action brought; and fourthly, a set-off as to all except 27*l.* 4*s.* 4*d.* The plaintiff replied that he accepted the money paid into court, satisfied. The defendant signed judgment of non-pros. on the ground that tiff had not replied to the other pleas. Held, that the judgment was there were inconsistent pleas on the record, though the replication had only.

ASSUMPSIT for money had and received particulars claimed 130*l.*; the balance of count of 40*l.* Pleas;—first, to the whole dec payment of 27*l.* 4*s.* 4*d.* into court, with an that the plaintiff had not sustained greater secondly, except as to 27*l.* 4*s.* 4*d.*, non as thirdly, as to 10*l.*, other parcel of the sums in the declaration mentioned, that the defend the plaintiff 10*l.* before the action was com fourthly, a set-off, except as to the said 27 Replication in the form provided by No. 19 new rules of pleading, [*ante*, Vol. IV. p. xiii.] livery of a plea of payment of money into co that the plaintiff accepted the said sum of 27 in discharge of the causes of action in the de of *Reg. Gen. Hil.* 4 *W.* 4. that he accepted the money paid into court, tiff had not replied to the other pleas. Held, that the judgment was there were inconsistent pleas on the record, though the replication had only.

mentioned, and was satisfied. The plaintiff took the money out of court and taxed the costs. The defendant then signed judgment of *non-pros.* *Comyn* having obtained a rule to set aside this judgment for irregularity,

Addison showed cause. The judgment was properly signed for want of a replication to the other pleas. By leaving them unanswered, the defendant could not get the costs of them without signing the judgment in question. There was but one count, and a party is not allowed to pay money into court on part of a count, *Hodges* v. *Lord Litchfield* (a). Then as the defendant could not sever the sum laid in the declaration, and plead payment into court as to 27*l.* parcel &c. of it, he was obliged to plead it as paid into court on the whole declaration. Then the other pleas were necessary, and ought not to have been passed by unanswered.

PARKE B.—You had no occasion to plead payment of 10*l.* for that was admitted by the particulars delivered with the declaration. Had there been another 10*l.*, the plea of payment of it should have been pleaded in the last place; the set off should then have been pleaded to the part for which there was no previous defence; and lastly, payment of the 27*l.* 4*s.* 4*d.* into court. You should first exhaust all your defences to the other portions of the demand, and then plead payment of money into court as to the residue. If in point of fact, you had paid the plaintiff 10*l.* and had a set-off for much as 10*l.* more, and the plaintiff had charged so much, you should have paid the money into court, and let him deal with it. There were here inconsistent pleas on the record to the whole declaration, and the judgment of non-pros was irregular.

(a) 9 Bing. 713.

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COATES v. STEVENS.

Per Curiam.—Lord ABINGER C. B., PARKE, BOLLAND and GURNEY Bs.

Rule absolute with costs.

CHALMERS *against* PAYNE and Another.

Case for a libel in a newspaper; plea, not guilty. The alleged libel purported to be a report of the trial of an action brought by the same plaintiff against other defendants who had justified; and, after recounting the libel in that action, the proofs in support of the plea, and the summing up of the judge, closed by stating that the jury found a verdict for the plaintiff, with 30*l.* damages. It did not appear whether any such trial had, in fact, taken place, or whether, assuming a trial to have been had, the report was or was not an impartial one. The jury were directed, that if, in their opinion, the report taken altogether indicated a malicious motive, actuating the defendants against the plaintiff, or was injurious to his character by mis-statement, or insinuating his being guilty of the matter originally imputed, notwithstanding he was stated to have obtained damages for that imputation, or that the report of such a trial was pure fiction invented by the defendants, their verdict must be for the plaintiff; with the observation, that if they thought that, taking the report altogether, the allegations contained in it to the plaintiff's prejudice were repelled by the verdict which he was stated to have obtained, so as not to be on the face of it injurious to him in the result, they ought to find for the defendants. The jury having found for the defendants, the court refused to disturb the verdict.

CASE for a libel published in the *Morning Post*, and professing to be a report of the trial of another action for libel brought by the same plaintiff against the proprietors of the *John Bull* paper, in which action the latter persons were stated to have pleaded a justification, averring the truth of the statement. The report now complained of stated the libel upon which the original action was brought, the defendants' proofs on the justification, also the judge's summing up, and ended by stating that the plaintiff had a verdict for 30*l.* Plea, general issue. At the *Middlesex* sittings after last term the passage in question in the *Morning Post* was put in and read, but no proof was given whether any such trial as that reported had or had not in fact been had, or whether, if it had, the report in question was a fair and impartial report of it. Lord *Abinger* C. B. told the jury, that if in their opinion the report was so worded as to indicate a malicious motive against the plaintiff, or to be injurious to his character by mis-statement, or by conveying an insinuation of his being actually guilty of the matter originally imputed, notwithstanding he was stated to

ave obtained damages for the imputation, or if the port of such a trial having taken place was pure fic- on invented by the defendants, their verdict should be r the plaintiff; but if they thought otherwise, or that e report, though containing some allegations preju- cial to the plaintiff, yet when taken altogether with e alleged verdict in his favour, was not on the whole jurious to him, the verdict should be for the de- ndants.

Stammers moved for a new trial on the ground of isdirection. This was not a privileged communi- tion, and the plea was the general issue only. Malice as an inference of law from the libel, *Bramage* v. *Prosser* (*a*), and should not have been left to the jury a matter of fact; nor was it proved that such a trial that stated had taken place. If it had, it should ave been pleaded in justification that it had, and that e account given was correct. That not having been one, it must be taken that no such trial happened; en the publication having been proved, the plaintiff as entitled to a verdict. He also cited *Flint* v. *Like* (*b*).

Lord ABINGER C. B.—I am of opinion that there is o ground for this motion. We cannot say that it is ecessarily a libel to publish a report of a trial. Then he question is, whether, taking the whole together, it is rejudicial to the plaintiff's character; and that is a uestion for the jury. Now if a publication is on he face of it injurious to a party, that is a wrongful et to which the law annexes the inference of malice, nd gives a right of action against him, whether he in- nded to commit an injury or not. That is a general

(*a*) 4 B. & C. 247. (*b*) 4 B. & C. 473.

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principle applicable in many cases, and not peculiar to that of libel. An indifferent act often becomes actionable when it becomes injurious to another, though not intended to be so. *Littledale* v. *Earl Lonsdale* (a) is an instance. There are other descriptions of libel in which a plaintiff is able to show a malicious intention on the part of the defendant; now, besides the injury to the plaintiff, the wrong is in such cases aggravated, and the damages ought to be increased. However, the first question to be determined in a case of libel is, whether or not the statement in question is calculated to be prejudicial to the plaintiff's character. I agree that the statement of a fictitious trial, in which the plaintiff is described as a party, may be a libel on him, though he is represented as obtaining a verdict with damages; but that is a question for a jury. It is now expressly provided by Mr. *Fox*'s act, that in criminal prosecutions for libel, the jury shall decide whether the publication of a libel is a libel or not. That is most just, for the effect of an alleged libel can be best judged by persons in the same condition of life with the object of it. I told the jury that they were bound to look at the whole, and if they thought that, though the publication stated circumstances to the plaintiff's prejudice, yet that taken altogether with the verdict in his favour, the result as so stated had repelled the injurious effect which might otherwise have arisen, their verdict should be for the defendants; but if they thought that the mere statement of the verdict in the plaintiff's favour was no palliation of the alleged libel, and left a sting behind it which was on the whole injurious to his character, their verdict ought to be for the plaintiff. After directing the jury to that effect, I gave them the report to take out with them, and they returned a verdict that it was not injurious to the plaintiff.

(a) 2 H. Bla. 269.

BOLLAND B.—We decide this case as we did in the similar one of *Dicas* v. *Lawson* last term.

ALDERSON B.—In *Dicas* v. *Lawson* the plaintiff complained of the report of a trial containing strong observations on his character, but also stating that he had obtained a verdict for 50*l.* damages. The report was said to be libellous, because it set out the charge made against the plaintiff in the first publication. At the trial I told the jury to look at the whole publication, and to consider whether, taking the whole of it together, it was such as would be likely to depreciate the plaintiff's character; and the jury decided that it was not, because they found that the damages awarded to the plaintiff took away the impression which would otherwise arise from the statement. On an application for a new trial, this court approved my direction. I perfectly agree that the law will infer malice from the act of uttering or publishing slanderous matter actionable in itself, and not justified by sufficient cause: but the question here for a jury is, whether slanderous matter has or has not been published. That question has been decided by them under a direction to take the whole together, and consider whether the result is calculated to injure the plaintiff's character. If the whole be not slanderous matter, and prejudicial to the plaintiff, it is not actionable; for though in one part of the publication something disreputable be imputed to him, it is removed by the conclusion which the jury, sworn to judge of its tendency, have arrived at; the "bane and antidote" are together, and for the jury to consider. Nor can we suppose, without proof, that the occurrence of such a trial was mere invention, or that newspapers publish reports of merely imaginary trials. The plaintiff enjoyed a great advantage in having the question of ma-

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licious intention left to the jury instead of its being withdrawn from them.

Rule refused(a).

(a) See *Rex* v. *Lambert and Perry*, 2 Campb. 398; *S. C.* 3 Howell's St. Tri. 340; *Orpwood* v. *Barkes*, 4 Bing. 461; *S. C.* 12 B. Moore, 492; *Cook* v. *Hughes*, R. & M. 102.

RATCLIFFE *against* HALL.

An action for diverting a watercourse, to which the general issue was pleaded before the new rules, was referred at the assizes, with all matters in difference, to an arbitrator, with power to determine the cause between the parties, the costs of the cause to abide the event. He awarded that a nonsuit should be entered, on the ground that the defendant was not proved to have diverted the water; but decided that the plaintiff had the right to the water. Held, that before the new rules, the defendant was entitled to recover the costs of all his witnesses, as well before the arbitrator as at the trial, including as well those called to prove his right to the water, as those adduced to disprove his having diverted it.

Held also, that the sum of 1s. a mile ought not to be allowed to the witnesses for travelling expenses, unless it had been paid them, and not if it was shown before the master that their actual expenses were less.

CASE for diverting a watercourse. Plea, general issue. The action was commenced and the trial took place at the *York* assizes, before the new rules came into operation, and the defendant pressed for a nonsuit, for want of proof that he had diverted the water. Eventually, however, the cause and all matters in difference were referred to an arbitrator, with power to determine the right between the parties, the costs of the cause to abide the event. The arbitrator being of opinion that it was not made out that the injury was committed by the defendant, ordered a nonsuit to be entered, but awarded the right to the water to be in the plaintiff, and denied the defendant's right to it, ordering the set-by which formed the nuisance to be abated. The master allowed the defendant the expenses of all his witnesses, including as well those called to establish his right to the water, as of those who came to show that he did not divert it.

Starkie now showed cause for the defendant, but the part called on

Wightman for the plaintiff to support the rule. The arbitrator's finding that the plaintiff has the right to the water, shows that the defendant had no defence to an action by the plaintiff to enforce it. It is as if the two questions had been submitted to the jury, and the defendant had only succeeded on one. Then he was only entitled to receive the costs of the witnesses called to support that issue, and not those of witnesses called to support his side of the issue on which he failed. At all events 1*s.* a mile should not be allowed to each witness for the mere travelling expenses, when their actual expenses were less, as they came together in an omnibus.

PARKE B.—The plaintiff has wrongfully brought an action against the defendant for an act which he did not commit, and has thereby put him to prepare for his defence by producing all the evidence he could bring forward in his defence on the issue taken. Whether he ultimately succeeded on one or the other point was immaterial. Before the new rules, had the trial ended in a nonsuit, the costs of all the witnesses would have been allowed. The master reports the practice to be, to allow the costs of all the witnesses when evidence might have been adduced under the general issue, whether they were called or not. It makes no difference that this was a case in which the arbitrator ordered a nonsuit to be entered. This question could not arise since the new rules, as there would be separate issues. But it may be referred back to the master, to reduce the allowance for the witnesses' travelling expenses to the actual sum expended.

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ALDERSON B.—You agree by the submis the costs shall abide the legal event of the tria event is, that a nonsuit was entered by the aw you must pay the costs accordingly. As to t travelling expenses allowed to the witnesse party can make affidavit that he has actually p at the scale charged, he should be allowed cordingly, but if he cannot, only the expense paid should be allowed.

Rule absolute on that groun

MORRIS *against* PARKINSON and Othe

Where the master, in taxing an attorney's bill of costs for carrying on three actions for the defendants, found that one of them had been improperly brought, and therefore disallowed the whole costs of that action, by which step more than one sixth of the bill was taken off:—Held, that the attorney was liable to pay the costs of taxation under 2 *G.* 2. c. 23. s. 23. though the material deduction was not caused by overcharges in any particular items, but by out one branch of the plaintiff's charges.

DOWLING moved for a rule calling on t tiff's late attorney to pay the defendant of taxation by the master of three bills of c vered to the plaintiffs by their late attorney causes. The master had disallowed the whol of items charged in the bill No. 3, on the gro that action had been brought by the mistak plaintiff's then attorney. By this means, m one-sixth of the taxed amount of the whole t taken together was taken off. The defendant fore clearly entitled to receive the costs of from the plaintiff's attorney, under 2 *Geo.* 2. 23. for they are not in the discretion of t *Higgins* v. *Woolcott* (*a*), *Elwood* v. *Pearce* (*b*) v. *Wills* (*c*).

(*a*) 5 B. & C. 760; S. C. 8 D. & R. 589; and see 1 Chit 63, note.

(*b*) 8 Bing. 83.

(*c*) *Ante*, Vol. III. 182.

'hilton showed cause in the first instance. *White* *ilner* (a) established that the attorney is not liable ay the costs of taxation, where the diminution of -sixth of his bill is caused by the disallowing a le branch of it on taxation, and not by reducing ticular items of it only. *Mills* v. *Revett* (b) supports t doctrine.

ord ABINGER C. B.—We need not go the length aying that *White* v. *Milner* is entirely overruled. ppears to have decided this, that where an attorney rges a party with costs wrongfully, and the whole disallowed, the bill is not to be considered as taxed ll. But if we were to extend that authority to a e like the present, where, for a specific reason, the ter disallows one of several items in an attorney's , as not properly chargeable, by which act it is re- ed by one-sixth, it would follow that in every case re the striking out an improper item had that effect, attorney would escape paying the costs of taxation er the statute, on the ground that the item disal- ed was not taxed, and that so the bill was not re- ed one-sixth by taxation.

ARKE B.—The master certifies that it is the prac- to consider a bill of costs, incurred in whatever ber of actions conducted by the same attorney, as bill, so that the costs of taxing his bill in the other actions must fall on the plaintiff. Now whether *ite* v. *Milner* be right or wrong, this is a very dis- uishable case. Here the defendant is the only son who could be charged, if any one could; whereas hat case, if any one was liable, it was *Brandon*, the ndant in the two actions, the costs of defending ch were sought to be charged on *Milner*. They

(a) 2 H. Bla. 357. (b) 3 N. & M. 767.

BOLLAND B.—A case was brought befo
the northern circuit, where an item of 1
counsel, and advanced by the client to his at
disallowed; which had the effect of reducin
bill by one-sixth, and the court held that
rule under 2 *G.* 2. c. 23. s. 23. applied, ar
attorney must pay the costs of taxation.

GURNEY B.—In *Higgins* v. *Woolcott*,
been mentioned, Lord *Tenterden*, after hea
v. *Milner* cited, denied that the court had
tion as to allowing costs in these cases.

Rule absolute w

FINCH, Assignee of the Sheriffs of Londo
COCKEN and Others.

In an action on a bail-bond given by a person named *Cocken*, there reciting himself to have been sued and arrested by the n
it was proved that the writ on which he was arrested named him
that the arrest was illegal, and the bail-bond also for the same reason,

DEBT on a bail-bond. The declarati
that the plaintiff sued out of the cour

quer a writ of capias against the defendant *William Cocken*, by the name of *Cocker*, and directed to the sheriff of *Middlesex* to arrest the said *W. Cocken* by the name of *Cocker*, and delivered it to the sheriff, who arrested the said *W. Cocken* and delivered a copy of the writ to the said *W. Cocken*, and he being so arrested, the defendants executed a bail-bond, the condition of which (after reciting that the said *W. Cocken*, sued as *W. Cocker*, had been taken on a writ issued against him by the name of *W. Cocker*,) was for his putting in special bail to the action. Averment, that he did not put in special bail, and that the sheriff had assigned the bail-bond to the plaintiff.

Pleas: first, non est factum; secondly, that no such writ of capias, as mentioned in the declaration, ever issued out of his said majesty's court of Exchequer against the said *W. Cocken* in manner and form &c. Issue thereon.

The cause was tried before *Alderson* J. at the *Middlesex* sittings in last *Michaelmas* term, when it appeared, that the writ issued against the defendant *Cocken* in the name of *Cocker*, and that he was arrested on it and executed a bail-bond in the name of *William Cocken*, sued and arrested by the name of *Cocker*. The defendant *Cocken* was proved to be the identical person intended to be arrested. The plaintiff was nonsuited on the case of *Scandover* v. *Warne* (*a*), but leave was given him to move to enter a verdict. *Barstow* accordingly obtained a rule in *Michaelmas* term, citing *Morgan* v. *Bridges* (*b*), and urging, that when *Cocken* was identified, the issue was proved in favour of the plaintiff. The court was of that opinion, but intimated that the objection was on the record, and

(*a*) 2 Camp. 270.
(*b*) 1 B. & Ald. 647; 2 Stark. C. N. P. 317, *S. C.*

to hear the declaration supported.

Barstow for the plaintiff thereupon sh
against arresting the judgment. It will b
this action on a bail-bond cannot be mai
cause the principal defendant in this action,
arrested in the original suit by his real nam
under a writ in which he was named *Cocke*
the plaintiff answers, first, that the obje
late; secondly, that since the new rules, i
taken at all; thirdly, that the arrest of a pe
mesne process in which he is wrongly n
longer illegal; and lastly, that the legality
is immaterial.

First, the objection comes too late. W
fendant is arrested by a wrong name, the o
which he can take advantage of the error,
diate application to the court or a judge
charged out of custody, and to cancel the
any has been given. He did in fact do
only defeated by his affidavit being enti
cause *Finch* v. *Cocker*, instead of *Finch*
sued by the name of *Cocker* (*a*). *Gurne*
son (*b*) shows this application to be too late

Secondly, since the new rules, *Hil. 2 W*
this objection cannot be taken at all, for
made to regulate the proceedings of the

ess or affidavit to hold to bail by initials, or by a
ng name, or without a christian name, the defend-
shall not be discharged out of custody, or the bail-
d delivered up to be cancelled on motion for that
pose, if it shall appear to the court that due dili-
e has been used to obtain knowledge of the
ormance." [*Alderson* B. That rule does not apply
he case before us. *Parke* B. What power have
by rule of court, an act of our own, to alter the law
ecting the arrest of *A. B.* instead of *C. D.*? The
ted only gives us power over the practice, in
r to render it uniform in the three superior courts
law.] *Alderson* B. The general rules of the courts
show the public how the judges' discretion will be
rised in cases where they possess it, but do not
cannot alter the law.] After declaration, the plea
abatement of the defendants' misnomer is taken
y by 3 & 4 *W.* 4. c. 42. s. 11., and his only course
o amend the declaration at the plaintiff's cost.
rke B. That act would not prevent this defendant
n suing in trespass for his illegal arrest, and we can
te no rule to prevent him.] How then can a bail-
d, thus given, be ordered to be cancelled? Sup-
e a man named James *Nokes*, but sued and arrested
John *Nokes*, procures the sheriff to take a bail-bond
n him in his true name, can he be sued on it? for
ld v. *Barnes* (*a*) shows that the defendant could
y be sued in the name in which he executed the
bond, viz., in this case his real name. [Lord
inger C. B. Suppose the actual name in the writ to
Cocken, and a bail-bond to be given as *Cocker*, you
t have sued him as *Cocker* and would have shown
n to be the same man. *Parke* B. No plaintiff need
n difficulty, for he may sue the defendant in the
e in which he executed the bail-bond, and if the

(*a*) 3 Taunt. 504.

which he signed the bail-bond, and if you s
be as well known by one name as the ot
him.] How could it be proved in this
*Cocke*n was as well known by the name c
by his real name? nor does it appear from
ings which is his real name. Had he give
in the wrong name *Cocke*r, he might be su
but if he was sued as having by the name
his real name, given this bond, he would u
bail-bond varied from the writ.

Thirdly, the stat. 4 & 5 *W.* 4. c. 42. s. 11
in effect the illegality of arresting a person
name. Before that act, every case where
was held liable in trespass for arresting th
who was wrongly named in the writ, was o
process, and his liability depended on this,
defendant had pleaded in abatement or n
had not taken that step, and final judgm
tained in the original action, he had lost his
of disputing the identity, and the sheriff
him in execution in the wrong name. (
Satchwell (*d*), *Cole* v. *Hindson* (*e*), *Shadg*
son (*f*), *Dixie* v. *Scholey* (*g*). [*Parke* B.
tend, that the defendant cannot take advar

(e) *Cole* v. *Hindson*, 6 T. R. 236; *Shadgett* v. *Clinton*

ect in the first writ, by way of objection to subse-
ent process against him on the bail-bond, because he
n knows that he was intended. The courts always
nted, or refused to grant summary applications for
charge on these defects, by analogy to the time for
ading in abatement; and refused to set aside the
its where the time for so doing was out; *Smith* v.
tten (*a*), *Binfield* v. *Maxwell* (*b*). In *Rex* v. *Sheriff*
Middlesex (*c*), it was expressly held, that a defend-
; arrested by a wrong name, did, by giving a bail-
nd in his right name, waive all objection to his arrest,
as to save the sheriff from being liable to attachment.
ord *Abinger* C. B. The sheriff having returned cepi
pus, was bound to bring in the body; all he could
was to get the return taken off the file.] In *Smith*
Shergold (*d*), the court refused to cancel the bail-
nd, on an affidavit that the name of *Williams*, in
ich he had executed it, was his real name, and that
Shergold, in the writ, was not; leaving him to his plea
ibatement. Thus, before the act of 3 & 4 *W.* 4. a party
ested by a wrong name might plead in abatement,
move to be discharged or to cancel the bail-bond.
t the plea in abatement is now taken away in civil,
it was previously in criminal pleading, by 7 *G.* 4. c.
. s. 19. That act is analogous, for if *Cocken* were
licted as *Cocker*, and a capias issued to the sheriff (*e*)
ainst *Cocker*, the sheriff must bring him before the
urt, without incurring liability, if the party was the
al man, for by the effect of the act he must plead to
erits. [Lord *Abinger* C. B. That proposition leads
an important question, whether resistance to an offi-
r, terminating in his death, would or would not be

(*a*) 6 Taunt. 115; 1 Marsh. 414, *S. C.* (*b*) 15 East, 159.
(*c*) 2 Chitt. Rep. 367.
(*d*) 3 T. R. 572; but see *Smith* v. *Innes*, 4 M. & S. 360.
(*e*) See 1 Chit. Crim. Law, 351.

murder, if the party was not correctly named in the warrant. *Parke* B. According to your argument, a general warrant would be sufficient without any name at all (*a*), or at all events with only *a nominal party*, *as John Doe*. Is a man bound to submit to any process, whether he be rightly named in it or not?] All that is required is the party's identity. Before that statute, *Carlile*'s shopman refused to give his name when arraigned, and was indicted as a "person present," *Rex* v. —— (*b*). At all events in civil process, as the plea in abatement is taken away, there is no judgment of cassetur billa. The sheriff was not liable for taking the defendant. If instead of giving a bail-bond he had appeared, he could not have pleaded in abatement, and had he remained in custody, the plaintiff might have gone on to final judgment against him. [Lord *Abinger* C.B. The remedy of discharge by habeas corpus remained to him in the meantime. You have unfortunately neglected to state in your declaration or any part of the pleadings, that he was as well known by one name as the other. If a defendant, arrested by a sheriff by a wrong name, afterwards gives a bail-bond, does that or any thing short of final judgment estop him from saying that the arrest in that particular cause was unlawful?] In *Culhum* v. *Leeson* (*c*), this court doubted whether a man, arrested in a wrong christian name, could, since 3 & 4 *W*. 4. c. 42. s. 11., be discharged on motion. [*Parke* B. Your proposition is most important, for, according to it an officer holding a criminal warrant against a person whose christian and surname were both wrongly stated might, on sufficient resistance (*d*), go to the last

(*a*) See *Money* v. *Leach*, 1 W. Bla. 555, 563; S. C. 3 Burr. 1 Hale P. C. 580; 2 Hawk. P. C. 82.

(*b*) Russell & Ry. Cr. C. 489.

(*c*) *Ante*, Vol. IV.

(*d*) See 1 Hale P. C. 494, 490; and 2 id. 118, 218: Foste East P. C. 297; 1 Ventris, 216.

ity of killing the man in order to arrest him, with-
being guilty of more than justifiable homicide.]
astly, the plaintiff is entitled to judgment indepen-
ly of that test, for proof of the actual arrest is so
aterial that it need not be stated in the declaration
n assignee of a bail-bond, *Haley* v. *Fitzgerald* (*a*),
if so stated is not traversable, *Watkins* v. *Parry* (*b*),
bail-bond is often given without any actual ar-
(*c*), and if given in a name differing from that in
writ, cannot be afterwards objected to, for the
ntiff was bound to sue the defendant *Cocken* in the
e by which he executed the bail-bond.

latt and *Dowling* supported the rule in arrest of
gment. As to the last point, whether the arrest be
erial or not, there must be valid process on which
rrest could legally take place before a bail-bond
be taken. For by 23 *H.* 6. c. 9. sheriffs are to
bail-bonds from persons in custody "by force of
writ," &c. thus involving the question, whether the
be valid or not. All the defendants here admit is,
Cocken was arrested on an improper writ. [Lord
nger C. B. They admit he is the person sued,
igh by a wrong name.] Here, the plaintiff must
tend that if the name of the defendant in the writ
utterly different, it would be valid. *Coles* v. *Hind*-
(*d*) and *Shadgett* v. *Clipson* (*e*) are in point against
plaintiff, for the averment of identity of the party
held insufficient. [Lord *Abinger* C. B. In those
es nothing had been done by the plaintiffs in the
inal actions (*f*). In *Crawford* v. *Satchwell* (*g*) it is

) Stra. 648. (*b*) *Id.* 444.
) *Ibid.* and see *Berry* v. *Adamson*, 6 B. & C. 528; *Bates* v. *Pilling*,
. 231.
) 6 T. R. 234. (*e*) 8 East, 328.
) See Lord *Kenyon*'s observation, 6 T. R. 236, and *Marryat*'s argu-
t, *id.* 234.
) Stra. 1218.

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stated, that where a bond is given in a wrong name, the obligor must be sued in that name. Now suppose a man arrested by his right name, executes a bail-bond in a wrong name, can he avail himself of that? This is not the case of a wrong person taken on a writ and compelled by the sheriff to execute a bail-bond, so that he might plead that the bond was executed under duress.] The arrest must be grounded on a legal writ, and taking the right] person will not cure his being wrongly named in the writ. Even where a debtor named *M. B.* had represented himself to be *G. B.*, and was arrested under a writ against *G. B.*, the sheriff was held justified in discharging him, *Morgans* v. *Bridges and another* (*a*). [*Parke* B. That case only shows that a sheriff is not bound to take the risk of arresting a person whose real name is not in the process, though he is the real defendant, and has actually held himself out to be of that name.] The cases of summary applications do not here apply, as the objection is on the record. Further, the arrest was illegal; for *Wilks* v. *Lorck* (*b*) decided, that if a sheriff arrests a man whose true Christian name is not named in a writ, he is a trespasser. See also *Rex* v. *Sheriff of Surrey, in Caffall* v. *Huntley* (*c*). Unless a writ may be executed against a defendant, whatever it may state his name to be, the judgment must be arrested.

Lord ABINGER C. B.—This case has assumed a very important aspect, having been argued on the ground, that the late enactments of 4 & 5 *W.* 4. c. 42. s. 11 and 7 *G.* 4. c. 64. s. 19. for abolishing pleas of misnomer, had occasioned a most material alteration in the general law of arrest, both in civil and criminal cases

(*a*) 1 B. & Ald. 647; 2 Stark. C. N.P. 317, S.C.
(*b*) 2 Taunt. 399. (*c*) 1 Marsh. 75.

ording to the old law no warrant for the arrest of person was valid, unless it contained his name, or, is name was unknown, a designatio personæ by ch he might be ascertained (*a*). Were we to hold rwise, we should once more let in the doctrines by ch it was attempted to support general warrants. because the legislature has disposed of pleas in tement in civil and criminal cases in a more expe- ous way than at common law, we were to infer that officer of justice might legally arrest a person whose e was not stated in the process then executed, we uld occasion great confusion, and overturn the well led law of arrest. But I am of opinion that that stands as before, unaltered by the late enactments; object of which was only to simplify and expedite cess in the particular instances provided for, with- having any operation over cases of legal procedure, idely differing from them as the present.

he question is, whether this bail-bond was valid at ? for if it was not, no judgment could be given on record. The answer depends on, whether the ar- was legal or not, and we are of opinion that it was

It is true, that, as between the plaintiff and de- ant in the original action, the objection to the writ ıt have been abandoned, for before the recent act, ıgh the defendant's misnomer could have then been ded in abatement, the plaintiff might have replied the defendant was as well known by one name as other. But as between the sheriff and the defend- the same objection remains to the defendant, unless cluded by some disabling admission made to the riff. If the arrest is not legal, the bail-bond founded it is also illegal, for both might have taken place by

(a) See as to the case of loose, idle, and disorderly persons, and search ants for them, on 5 *G.* 4. c. 33. ss. 7, 8, 13. and the previous act, 17 *G.* 5. s. 6. alluded to in 3 Burr. 1766.

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compulsion. I was at first struck by the argument for the plaintiff, that the execution of the bond by the defendants had shut out the objection; but it is assumed that the writ issued contained the right name. Had that been so, and had the defendant, when arrested, given the sheriff a bond in a wrong name, it would have been a different case, for the arrest was legal and sufficiently warranted by the process, and the sheriff might justify it under the valid writ, and state in pleading that the bail-bond was given by the defendant under a false name. Here, nothing shows that the name in the writ is not wrong, or that the name in the bail-bond is not right; viz. that *Cocken* in the bail-bond was not named *Cocker* in the writ. Then the pleadings, as well as the authorities, show that the sheriff never had a legal authority to arrest this defendant. Such an illegality may, no doubt, be waived by the defendant's suffering the proceedings to go on to execution, he having been then identified, and the objection being estopped by the final judgment. But nothing here prevents the defendant from taking it against the assignee of the sheriff. Were we to hold the writ legal, it might happen that if, in criminal cases, the sheriff or his officer were killed by a party misnamed in the process, and resisting its execution accordingly it would be held murder, while, on the other hand the officer might kill the party who resisted. But consider the law of arrest in criminal and civil proceedings unaltered by any modern statute, except the purpose of expediting legal procedure.

PARKE B.—I shall add very little on the The question on the pleadings is, whether the mentioned in them issued or not? Evidence to show, that *Cocken* was the person actually to be sued by that process, but the plaintiff

l. On motion to set aside that nonsuit, we were
ɔinion that the issue was proved by the plaintiff,
hinking the question was on the record itself, di-
d judgment to be entered for the plaintiff, and
wards, on motion in arrest of judgment, desired it
argued whether, the arrest being invalid, the bail-
was not also illegal. The argument, that the
ɔond might be good while the writ was bad, fails,
ı it is considered that the statutes of 23 *H.* 6. c. 9.
ł *Ann.* c. 16. s. 20. only authorize taking bail-bonds
e defendants are lawfully in custody; I am there-
satisfied that this bail-bond would be void before
4 *W.* 4. c. 42. s. 11. But that enactment (fol-
g up the principle of 7 *G.* 4. c. 64. s. 19. in cri-
l cases,) abolishes the plea of misnomer altogether,
ıubstitutes a new course of procedure, which gives
re speedy remedy than that plea did. Were we
ɔribute any other effect to it, serious results might
r as to the relative amount of guilt in homicides
nitted by or upon officers of justice engaged in
ation of irregular process. Besides which, a
ff would be bound to execute, and a party to
process, by whatever name the object of it was
in described. The new act places the defendant
e same situation as if it had been left competent
n to plead in abatement, without its having any
t on the validity of the bail-bond. Then the law
ins as before, viz. that no writ, civil or criminal,
be obeyed or executed, unless the right name of
party upon whom it is to be executed, or a name
hich he is known, as well as by his right name,
serted in it; but that where either of those re-
tes is complied with, it must still be obeyed.

ɔLLAND B.—The law is not altered in cases where
rrest is illegal on account of the imperfection of

the writ. This writ being bad, the bail-bond founded on it cannot be valid. The form of pleading cannot alter that state of things.

EN
thers.

ALDERSON B.—Nothing in the 3 & 4 *W.* 4. alters the previous law that a person arrested by a wrong name is illegally arrested, and need not give a bail-bond. In the old cases the capability to plead in abatement was put as the criterion, whether the arrest was right or wrong. The new act takes away that plea, and gives another test; but the mode in which it is to be applied is the same, and the question, whether the writ is lawful, remains as before, and subject to the same rules.

Judgment arrested.

REX *against* WOOLLETT.

A demurrer by the crown in a revenue cause need not have a marginal statement of the point to be argued, for the general rules of the three courts of common law, made pursuant to the 3 & 4 *W.* 4. c. 42. s. 1., do not extend to matters over which they have not concurrent jurisdiction.

A demurrer by the crown in a revenue cause should be signed by the Attorney-General before its delivery.

KAYE showed cause against a rule obtained by *J. Jervis*, calling on the Attorney-General to show cause why his demurrer to a plea in a *scire facias* on a recognizance of bail should not be set aside for irregularity, on the grounds that it had no statement of the point in the margin, according to *Reg. Gen. Hil.* 4 *W.* No. 2., and that it was not signed by the Attorney-General or other counsel. On the first point, as three courts do not exercise concurrent jurisdiction in revenue causes, the new rules do not apply to *Barnes* v. *Jackson* (*a*). [*Parke* B. The new clearly do not extend to revenue cases, for the given.] On the other point, *Kaye* urged that a demurrer by the Attorney-General, acting for the crown, be within the principle of the rule requiring it to be signed by counsel, the object of which

(*a*) 1 Bing. N. C. 545.

nt frivolous demurrers. It is now signed in fact. so read an affidavit of the agent of the clerk in of the crown, stating it to have been usual, in to prevent delay, to deliver demurrers and other ings to the defendant's clerk in court, without first signed by the Attorney-General, it being well ı that his signature could be afterwards had to as a matter of course; and that it was usual for erk in court, by whom they were delivered over, t the name of the Attorney-General to the fair as a matter of course, though the original was not l at the time of delivering the copy.

Jervis contrà. The affidavit sufficiently shows he Attorney-General's signature to the demurrer ecessary before it could be duly delivered.

rd ABINGER C. B.—The demurrer is by the ney-General in person, who is supposed to be in when it is delivered. It seems to be an ascer- l practice that all other pleadings on the part of rown are signed by the Attorney-General before are delivered, but that demurrers are sometimes red without it. Though they are rare, and ap- like the present, to have been sometimes signed the delivery, it seems that, in strictness, they to be signed before. The objection having been aken, the rule must be absolute on that ground.

Rule absolute.

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TINN *against* BILLINGSLEY.

The plaintiff's agent in *London* served the defendant's agent there, on a *Saturday* morning, with a notice to admit the defendant's execution of certain documents, at an assizes 274 miles off, the commission day of which was on the following *Wednesday*. The defendant's agent, who had prepared the defendant's briefs, positively refused on the *Monday* to make the admission, but without assigning as a reason that the notice was not given within a reasonable time before the trial, as directed by *Reg. Gen. Hil.* 4 *W.* 4. No. 20. Held, that the plaintiff having obtained a verdict at the trial, was entitled to the costs of a witness called to prove the defendant's hand-writing.

AT the last *Northumberland* assizes the plaintiff had obtained a verdict against the defendant for running down his ship in *Harwich* roads. In order to show that the defendant was owner of the ship which ran down that of the plaintiff, he produced examined copies of her register, and of the defendant's signature to the affidavit and declaration of ownership, which he proved by a witness from the Custom House at *Harwich*. At the taxation he claimed the costs of proving them, pursuant to *Reg. Gen. Hil.* 4 *W.* 4. No. 20, stating that the defendant had refused to admit them. The master having disallowed these costs, a rule was obtained to review the taxation, on an affidavit that the commission day at *Newcastle* being the 4th of *March*, the plaintiff's *London* agent, on *Saturday* the 28th of *February*, served a notice on the defendant's agent, to admit the above documents, informing them that they would lie for inspection at the plaintiff's attorney's office till six that day. They were not inspected that day, and on *Monday* the 2d of *March* the defendant's agent sent an answer that they would positively not be admitted. A summons was on that evening served on the defendant's agent to admit them, but he refused. The defendant's then *London* agent swore that they pleaded on the 21st of *January*, and that issue was joined on the 4th of *February*, that the defendant himself lived at *Harwich*, and that the defendant's original attorney having died in *February*, he prepared the briefs, but was obliged to attend the trial of another cause at *Hertford* assizes on *Monday* the 2d of *March*.

W. H. Watson showed cause. By *R. G. Hil.* 4 *W.* 4. No. 20., after plea pleaded, and at a "reasonable time"

before trial, either party may give notice to the other of his intention to adduce in evidence certain written or printed documents; and unless the adverse party shall consent by indorsement on such notice, within forty-eight hours, to make the admission specified, the party requiring it may call on the party required by summons, to show cause before a judge why he should not consent to such admission, or in case of refusal, be subject to pay the costs of proof. The rule further provides, that no costs of proving any written or printed document shall be allowed to any party who shall have adduced the same record at the trial, unless he shall have given "such notice *as aforesaid*," by these last words clearly referring to the notice directed to be given a "reasonable time before the trial." The plaintiff here delayed all the time from the 4th *February*, when issue was joined, till the 28th *February*, before he gave any notice to admit the documents, nor was the summons given till *Monday* the 2d *March*, viz. the day but one before the commission day of assizes held at a place 274 miles off. The master considered the summons not to be given a reasonable time before the trial, and therefore refused the costs. The defendant had no time to examine the documents, or, as the defendant lived at *Harwich*, to confer with him as to their correctness.

Cresswell in support of the rule. The plaintiff is entitled to the costs of the witness called to prove these documents, and the defendant's agent having been entrusted to prepare the briefs, must have had that full knowledge of the cause which would enable him to know, without consulting the defendant, whether those documents ought to be admitted or not. He had the notice on the *Saturday*, and did not refuse to admit them till the *Monday*, in consequence of which the summons was taken out. Nothing in this second

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TINN v. BILLINGSLEY.

branch of the rule which has been cit
plaintiff's right to costs under the sta
ter, or compels him to take out two su

Per Curiam (*a*).—Justice requires
should have his costs, and the ambigui
rule cited prevents us from saying th
especially as the defendant's agent neve
sufficiency of the notice, on the grou
been given too late to admit of the ne
tion of the documents. When the admis
no reason for doing so was assigned, s
tiff could only withdraw his record, or
Then as he succeeded at the trial h
costs.

(*a*) Lord *Abinger* C. B., *Parke* and *Boll*

TARRANT *against* MORG

A plaintiff took out of court a sum under 40*s*. which had been paid in on the usual plea, pursuant to *Reg. Gen. Hil.* 4 *W.* 4. Nos. 17 and 19. Held, that a suggestion could not be entered on the roll in order to deprive him of costs, on the ground that he had admitted that his action was brought for a sum recoverable in the county court.

ASSUMPSIT to recover 8*l.* for jo
the defendant's request. Plea, pa
of 1*l.* 18*s*. The plaintiff accepted th
faction of the action (see Nos. 17 & 1
Hil. 4 *W.* 4.) Before the costs were t
February, *Bolland* B. made an order
the defendant to suggest on the roll,
was brought for a debt recoverable
court of *Cardigan*, so as to deprive the
A rule for setting aside this order havi
on the 6th *May*, cause was shown th
had a right to enter the suggestion
plaintiff, by taking 1*l.* 18*s*. out of court, h
action to be brought for a sum less th
port of the rule it was contended tha

laintiff of 1*l.* 18*s.* in satisfaction of his demand, ihow that no more was due. The usual appli- a case where it is thought that the plaintiff's under 40*s.* is to stay the proceedings. Had al course been taken, the plaintiff would have le to show that the action was brought for ls. An affidavit to that effect was produced.

uriam.—(Lord *Abinger* C. B. *Parke, Bolland, rson* Bs.) It is not usual in practice to move a suggestion where no act directs it. The ourse would have been to move in an earlier the cause to stay proceedings, on the ground were instituted for a sum below the dignity rior court, and which might have been reco- the county court. However, the same answer ave been given as at present. But the 19th ich has been cited, expressly reserves to the his costs, and permits him to tax them, and gment for the amount, if not paid in forty-eight ter the taxation.

Rule absolute to set aside the order.

m supported the rule; *R. V. Richards* showed

See *Sandall* v. *Bennett*, 2 Adol. & Ell. 204.

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HENNAH and Another *against* WYMAN.

Writs of summons as well as capias may be indorsed, "This writ was issued by &c. attorney for the said *plaintiffs*," without naming him (see 2 *W.* 4. c. 39. schedule.)

THE copy of the writ of summons which was served was indorsed, "This writ was issued by &c., attorney for the said *plaintiffs*," instead of naming them as in the body of the writ (*a*). On motion to set aside this service for irregularity, a case in C. P. was cited from *Petersdorff's Practice*, 264. Cause was shown in the first instance, that though the word "plaintiffs" was not in the body of the writ, that could not be a material variation, for though that word is not in the statutory form of the capias, that form is thus indorsed, "This writ was issued by *E. F.* of &c., attorney for the *plaintiff*."

Per Curiam.—There seems no reason why the indorsements on the writ of summons and capias should differ. We have laid down and acted on this as a rule—that where the acts for regulating our process provide that it shall be in a particular form, that must be followed (*b*). But this act, 2 *W.* 4. c. 39. prescribes no precise form for the indorsement, and that given by the schedule is only an example or instance. Had this indorsement given less information than is required by the act, or tended to mislead the defendant, we might have held otherwise. We have not a precise account of the case in the Common Pleas.

Humphrey for, *J. Jervis* against the rule.

Rule refuse

(*a*) The form of this indorsement provided by the schedule of 2 c. 39. is, "attorney for the said *A. B.*"

(*b*) *Jackson* v. *Jackson*, *ante*, 136; *Pybus* v. *Bryant*, *ante*, Vol. I

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GOODALL *against* ENSELL.

or words slanderous in themselves, spoken plaintiff in his capacity of a schoolmaster. damage was laid. The plaintiff obtained a 20*s*. damages, and the judge certified for The master having allowed them accord- e was made absolute, directing him to review n, on the authority of *Turner* v. *Horton* (*a*), words are actionable in themselves, the nnot recover more costs than damages; the ng, that a judge could not certify to deprive of costs in an action for words slanderous in . *Adams* Serjt. for plaintiff, *Mellor* for de-

Where a plaintiff recovered less than 40*s*. damages for words slanderous in themselves, and spoken of him in his capacity as a schoolmaster, he is entitled to no more costs than damages, and the judge cannot certify for full costs (21 *J*. 1. c. 16. s. 6.)

438; and see *Grenfell* v. *Pierson*, 1 Dowl. P. C. 409.

GOODENOUGH *against* BEETLES.

a general verdict for the defendant, the plain- ok out a side-bar rule to discontinue. The d *Abinger* C. B., *Parke*, *Bolland*, and *Al-*) made a rule absolute to set aside that rule, if the plaintiff could discontinue, applica- ave to enter a nonsuit would be superfluous. is laid down in *Price* v. *Parker* (*a*), that continue could not be given after a general ough it might possibly, as a great favour, cial verdict, that not being final. In *Sweet-* se (*b*), the objection was not made, and the

If, after general verdict for the defendant, the plaintiff obtain a rule to discontinue, it will be set aside on motion.

9. (*b*) 9 B. & C. 369.

5. court had granted a new trial (a). *Knowles* for, H[illegible]
NOUGH *frey* against the rule.
). (a) See *Gray* v. *Cox*, 5 B. & C. 458; *Porter* v. *Cooper*, post, 798.
TLES.

YORATH *against* HOPKINS.

A *fi. fa.*, returnable 30 *December* 1833, was delivered to a sheriff to be executed on the 20th. The sheriff went out of office in *February* 1834, without executing the writ, and without having been ruled to return it. In *June* 1834, the new sheriff was ruled to return the writ, which not being done, a rule to return the writ was served on the under-sheriff of the late sheriff in *November* 1834. Held, that the late sheriff was not liable to attachment, (3 & 4 *W.* 4. c. 99. s. 7.)

A *FI. FA.* was sued out on the 14th *December* 1833, r[illegible] delivered to the sheriff on the 20th, returnable the 30th. He went out of office in *February* 1834. the 14th *June*, the under-sheriff of the new sheri[illegible] served with a rule to return the writ; and on 12[illegible] *vember* 1834, a similar rule was left at his late sheriff's office. The writ not being returned for attaching the late sheriff was granted.

Crowder showed cause in support of the a[illegible] [*Parke* B. The former sheriff ought to have the writ, and, if not, should, at least, have over to his successor.] That was the law 3 & 4 *W.* 4. c. 99. s. 7. which was in for[illegible] of this transaction, and expressly enacts t[illegible] shall, at the expiration of his office, mak[illegible] liver to the new or in-coming sheriff a [illegible] list and account under his hand of all custody, and of all writs and other hands not *wholly* executed by him. not the old sheriff have gone on t[illegible] which he had begun to execute same section provides, that the ne[illegible] cute all the process handed ove[illegible] its directions, viz., that not wholly decessor. [*Parke* B. acceded, precaution of ruling both sheriff

do so. *Tidd*, in his *Practice*, 307, (9th edit.) if there be no return, it is a contempt for which urt, on a proper affidavit, will grant an attach- and this is the constant mode of proceeding the late sheriff as well as the present one; for, he former, he ought in strictness to have re- the writ before he was out of office, and there- e contempt was absolutely committed whilst he ervant of the court." Why should not a sheriff le to attachment for not returning a writ directed without the further admonition to do so con- by a rule to return the writ?

KE B.—The passage cited must apply to a case the late sheriff has been ruled to return the That will appear from the authorities there (*a*). I am of opinion that the old sheriff was ble to be attached, because, while in office, he t served with a rule to return the writ.

Curiam.—PARKE, BOLLAND, ALDERSON, and TY Bs.

Rule absolute for setting aside the attachment with costs.

z. *The King* v. *Adderley*, Dougl. 464; and *The King* v. *The late*

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BOND *against* BAILEY.

On a trial under a writ of trial, a verdict was recovered for less than 5*l*. The plaintiff signed judgment and issued execution in vacation. On the first day of the next term the defendant applied to enter a suggestion on the roll to deprive the plaintiff of costs, on an affidavit, that at the time the cause of action accrued, and till a day named, he had a warehouse and counting-house, and after that day, down to the time of commencing the action, he had a house and warehouse, all in the city of *London*, where he resided and carried on the business of a silk-broker, and that he had from *January* 1833, sought his livelihood, and still seeks it in the city, by carryi trade and business at the said houses and warehouses respectively. (Se *G*. 3. c. 104. s. 12.) Held, first, that the affidavit was sufficient to deprive tiff of costs; secondly, that the defendant had moved in time; thirdly, th not state when the action was commenced; and lastly, that the defendan to the writ of trial had not taken away his right to enter a suggestion for

A RULE had been granted to enter a su on the roll to deprive the plaintiff of cost the *London* court of requests' act, 39 & 40 *G*. 3. s. 12. on the ground that the plaintiff had re less than 5*l*. in an action in this court for go and delivered, tried before the secondary of . under a writ of trial. It appeared from the a that, at the time when the cause of action accru down to *June* 1834, the defendant had a wareho counting-house in the city of *London*, where he on trade and business as a silk-broker, and that fr 1834 to the time of swearing the affidavit he h stantly resided in a house and warehouse in *Crow Old Broad Street*, where he carried on a like tr business with his brother, having a lease of the ho paying rent for it. It was also sworn, that from 1833, he had sought and still seeks his livelih carrying on his trade and business at those said and warehouses respectively. His own and his b names were over the door of the warehouse in *Court*. Judgment had been signed, costs tax execution issued, before the motion was made.

G. T. White showed cause. The affidavit d sufficiently show that the defendant sought h hood in the city of *London*. Having a warehou will not raise the inference, *Fuller* v. *Williams*

(*a*) 5 Esp. N. P. C. 19.

ies v. *Watts* (*a*), *Gray* v. *Cook* (*b*). In *Kemsett* v. *Vest* (*c*), a coal-merchant resided and carried on business in *Surrey*, but kept a counting-house in *London* for receiving orders only. He was held not entitled to the benefit of this act as seeking his livelihood in the city (*d*). Secondly, it should have been made appear when the action was commenced, and that the defendant was seeking his livelihood in *London* then; *Moreau* v. *Hicks* (*e*). Thirdly, the defendant having consented to the trial before the secondary, cannot now insist on altering a suggestion. Fourthly, this application is too late.

Platt supported the rule.

Lord ABINGER C. B.—The defendant states he had a warehouse and counting-house in *London* before and at the commencement of the suit. It is, therefore, quite immaterial when the action was commenced, if he swears he was seeking his livelihood in the city at that time. If you could have shown that he was living elsewhere, it might have been an answer to the rule. As to the last objection, the defendant came as soon as he could, for the judgment being signed and execution issued in vacation, he could not apply to the court before the first day of term. The plaintiff must take the consequences of his dispatch in taxing the costs and issuing execution.

PARKE B.—What difference can it make that the cause was tried by consent before the secondary? The cases cited are very different from this.

BOLLAND B.—The affidavit states, that the defend-

(*a*) 1 New R. 153. (*b*) 8 East, 336.
(*c*) 5 D. & R. 626.
(*d*) See *Double* v. *Gibbs*, 3 Tyr. 224; *Smith* v. *Hurrell*, 10 B. & C. 542.
(*e*) 4 Nev. & Man. 563.

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ant lives, resides, and carries on the business of a sil[redacted] broker within the city, and not merely that he keep[redacted] a servant there to receive orders.

Rule absolute.

PORTER *against* COOPER.

Evidence material for the defendant was improperly rejected on the execution of a writ of inquiry, and a new inquiry was ordered on that account. The defendant, however, to avoid the expense of a new inquiry, paid the amount already assessed by the jury:—Held, that he was not bound to pay the plaintiff the costs of the inquiry.

MATERIAL evidence tendered by the defendant had been rejected on the execution of a writ of inquiry, and a fresh inquiry was granted, after cause shown. Instead of a second hearing, the defendant paid the amount assessed for the plaintiff on the first inquiry, and the master allowed the plaintiff the costs of it. A rule having been obtained to review his taxation, it was shown for cause, that as the defendant had admitted the sum awarded by the jury to be right, the plaintiff ought to have the costs of the first inquiry. *Jackson* v. *Hallam* (*a*) is in point, and a much strong case. There the plaintiff having a verdict, the co granted the defendant a new trial, on the groun misdirection in point of law, without expressing thing as to costs in the rule. Instead of going to the defendant gave the plaintiff a cognovit, a held liable to pay the costs of the trial. The p of the damages assessed on the first inquiry case, is more than tantamount to the giving th vit in that cited. The provision in the new r *2 Will.* 4. No. 64, applies only to new trials. In support of the rule it was answered, th v. *Hallam* was decided on the ground that ant, by giving a cognovit, had admitted tha tion to set aside the verdict was unfoun

(a) 2 B. & Ald. 317.

and all the evidence been given, the verdict must still have been against him on the merits. But no such inference arises from what this defendant has done, for this being an inquiry, the plaintiff *must* have recovered some damages which *must* have covered the costs, so that it was better to pay the balance without incurring extra costs of the new inquiry. [*Parke* B. The plaintiff says, that according to the old practice of this court he should have been entitled to the costs of the first trial at which the misdirection took place, if he succeeded in the second.] The distinction on the subject of new trials before Reg. Gen. *Hil.* 2 *Will.* 4. No. 64. was, that if the miscarriage at the first trial was caused by the jury, the loser was to pay the costs of that trial, but not where it was the error of the judge. Why should the defendant be put in a worse situation because he pays the amount demanded rather than go down to a second inquiry, the further costs of which must fall on him? He cited *Gray* v. *Cox* (*a*).

Lord ABINGER C. B.—The act of the defendant has not placed the plaintiff in a worse situation than he would have been in, had he recovered the same damages on a second inquiry; but the defendant had a right to prevent that expense in the manner he has done. Nothing takes this case out of the general rule.

PARKE B.—The general rules of costs are those to which as few exceptions as possible should be introduced. Now, had this case gone to a second inquiry, the defendant must have paid damages, but the costs of the first inquiry would not have been payable by him to the plaintiff, as costs in the cause. Then does this act of the defendant form any exception to the

(*a*) 5 B. & Cr. 468. As to this case, see *Sweeting* v. *Halse*, 9 B. & Cr. 369, n.

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general rule? I am of opinion, on the ground taken in support of the rule, that it does not, and that *Jackson* v. *Hallam* is such an exception, and is distinguishable from the present case. Here, the defendant must pay the damages given by the jury on the inquiry. No exception to the general rule should be made in this case. The rule must be absolute, without costs on either side, the error being that of the officer.

Rule absolute without costs.

R. V. Richards supported the rule, *J. Jervis* showed cause.

KING *against* TAYLOR.

The plaintiff being arrested by the defendant, during privilege, was discharged by a judge's order, on condition that if the defendant paid all the costs the plaintiff had been put to, as the same should be taxed by the master, he should not bring an action for the arrest. The costs were taxed and the amount paid to the plaintiff, but a review of the taxation being ordered, further costs were allowed him which the defendant refused to pay. The plaintiff then sued the defendant in assumpsit on an agreement to pay the costs, in consideration that the plaintiff would relinquish all right of action against him for the improper arrest: —Held, that the action would not lie on the judge's order or rule of court for payment of costs, no agreement appearing to have been entered into by the defendant to pay the taxed costs at all events.

ASSUMPSIT. The declaration stated, that before the making of the agreement, promise and undertaking of the defendant, thereinafter mentioned, to wit, on &c., the defendant had wrongfully taken and arrested the plaintiff, by his body, upon and by virtue of a certain process issuing out of the Palace Court, at the suit of one *J. Cable*, and had rendered the plaintiff to the custody of the marshal of the *Marshalsea* upon that occasion, and the said plaintiff saith, that being in such custody as aforesaid, heretofore, to wit, on &c., a certain writ of our lord the king, called a writ of *habeas corpus cum causâ*, was duly issued out of the court of our lord the king before the king himself at *Westminster*, directed to the judges of the Palace Court of

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stminster, and to each of them, by which said writ said lord the king commanded them that they uld have the body of him the said plaintiff there ained in his majesty's prison of the *Marshalsea*, ler the custody of the marshal of the said prison, ether with the day and cause of detaining him, fore the Right Hon. *Thomas* Lord *Denman*, Lord ief Justice of his majesty's court of King's Bench, fore him at his chambers in *Serjeant's Inn, Chancery ne*, immediately on the said writ, to do and receive at the said lord chief justice should then and there ak fit to order concerning him the said plaintiff in t behalf; and the plaintiff further saith, that afterds, to wit, on &c. he was brought before the Right n. Sir *James Parke*, Knt., one of the justices of the urt of our lord the king before the king himself, at chambers in *Serjeant's Inn, Chancery Lane*, purunt to the statute in that case made and provided, by tue of the said writ of *habeas corpus*, directed as resaid, and thereupon the said Sir *James Parke*, it. so being such justice as aforesaid, upon hearing parties, their attornies and agents, ordered, that plaintiff should be forthwith discharged out of the stody of the keeper of the *Marshalsea* prison, as to arrest at the suit of the said *J. Cable*, and whereon the said plaintiff was discharged from the said stody, and thereupon heretofore, to wit, on &c. in nsideration of the premises, it was mutually agreed and between the plaintiff and defendant, that the aintiff should relinquish all right of action against e defendant, on the occasion of the arrest and deiner, and also consent and agree not to bring any tion against him the said defendant, on occasion the premises, and that the defendant should therepon pay to the plaintiff all the costs, charges, and penses which he had then sustained and been put

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unto by reason of the said arrest and detainer by the defendant as aforesaid, and necessarily incurred by the plaintiff in obtaining his discharge therefrom, and the same should be taxed and allowed by the master of the court of Exchequer, and also the costs and charges of making the said order a rule of the said court: And the said plaintiff in fact saith, that the costs, which he sustained by reason of the premises, were taxed by the said master of the said court of Exchequer, at the sum of 12*l.* 16*s.* 7*d.*, and that the costs of making the said order a rule of the said court of Exchequer, amounted to a certain other large sum of money, to wit, 5*l.* 7*s.* 2*d.*, making together the sum of 18*l.* 3*s.* 9*d.* of lawful money of *Great Britain*, whereof the said defendant afterwards, to wit, on &c. had notice; and the plaintiff further saith, that although he hath done and performed every thing in the said agreement mentioned on his part and behalf, and although the defendant in part performance of his said agreement, promise and undertaking aforesaid, to wit, on the day and year last aforesaid, paid to the plaintiff a certain sum of money, to wit, the sum of 7*l.* 13*s.* 3*d.* on account of the said costs and charges aforesaid, yet the defendant, not further regarding his said promise and undertaking, hath not at any time thence hitherto, although often requested by the plaintiff so to do, paid to the plaintiff the residue of the amount of the said costs, or any part thereof, but hath hitherto neglected and refused, &c., and the said sum of 10*l.* 10*s.* 6*d.* residue of the said sum of money, still remains due and owing to the plaintiff, contrary to the promise and undertaking of the defendant so by him in that behalf made as aforesaid. Count upon an account stated. The defendant pleaded the general issue, non assumpsit.

This case was tried before the sheriff of *Middlesex*,

3d *February* last. The plaintiff, while attending a mmons at a judge's chambers, was taken in execu- n by the defendant, an officer of the Palace Court. e was afterwards brought up from prison on a *habeas pus* before Mr. Justice *James Parke* at chambers, 12 *March* 1834, and was discharged, on condition at if the defendant paid him his costs to be taxed the master, he should bring no action for the rest. The defendant paid the plaintiff 7*l.*-13*s.* 3*d.*, ing the costs taxed by the master, but the plaintiff aving obtained a baron's order to review the taxation, e master allowed him 5*l.* 3*s.* 4*d.* more, which the fendant refused to pay. Upon this the plaintiff pended 5*l.* 7*s.* 2*d.* in making the judge's order a rule court, and sued the defendant for the two last-men- ned sums, amounting together to 10*l.* 10*s.* 6*d.*

The defence was, that no action would lie on a dge's order or a rule of court for payment of costs, ithout showing an agreement by the defendant to y them. The under-sheriff directed a verdict for l. 3*s.* 4*d.*, the amount of the additional costs awarded n the second taxation, giving the defendant leave to ove to enter a nonsuit.

A rule having been obtained accordingly, the plaintiff in person showed for cause, that the defendant's agreement to pay the amount of costs really payable, was sufficiently apparent from his having attended the first taxation, and paid the sum then allowed by the master. He insisted also, that his having forborne to sue the defendant for the illegal arrest, was a sufficient consideration for his promise, and mentioned *Porter* v. *Cooper* (*a*) as in point.

(*a*) 4 Tyr. 456.

was any absolute contract by the defen
such costs as should be allowed by the m
ation. The plaintiff agreed, that he would
defendant for the improper arrest, if he p
costs necessarily incurred in obtaining hi
Thus the defendant had the option of pa
not. No action can be sustained on a ju
though it will lie on an agreement whic
one. Then as there is here no agreeme
costs independently of the judge's order,
cannot be maintained.

The rest of the Court (PARKE, BOLLA
DERSON Bs.) concurred.

Rule

THOMAS *against* THOMAS and Ano

Where a party became seised in fee of one set of premises, and possessed of a chattel interest in another, the owner of which latter had previo easement in the former, it was held, that such unity of possession of

CASE. The declaration stated, that t
before and at the time of the com
grievances &c., was, and from thence ha

still was lawfully possessed of a certain messuage or dwelling-house, yard, and premises, with the appurtenances, situate and being in the county of *Devon*, to wit, in the borough and town of *Crediton*, in the said county, and of a certain thatched wall, standing and being in and upon those premises: and by reason of such possession, during all that time, she the plaintiff, for the necessary use and enjoyment of her said premises, ought to have had, and still of right ought to have, the use and benefit of a certain channel, drain, gutter, or sewer, leading and running by and from the said messuage or dwelling-house, over, across, along, and through the said yard of the plaintiff, unto and into certain premises in the possession or occupation of the defendants there, near to the said premises of the plaintiff, by, through, and along which the said drain &c. (here followed a statement of the uses of the drain in carrying off filth &c.:) and also, by reason of such possession as aforesaid, she the plaintiff was, during all the time aforesaid, entitled to the benefit, easement, privilege, and advantage of having and permitting the eaves and thatch of her said wall to extend and project a convenient space beyond and from the said wall, over and upon the said premises so as aforesaid in the possession or occupation of the defendants, for the convenience and use of conveying and carrying off from her said wall and thatch thereof the rain which from time to time descended and fell thereupon: yet the defendants, well knowing all the premises, but contriving &c., whilst the plaintiff was so possessed &c. as aforesaid, to wit, on &c., wrongfully and injuriously shut, closed, stopped up, and obstructed the said drain, channel, gutter or sewer, by and by means of divers large quantities of brick &c., and the same so shut, closed, stopped up, and obstructed as aforesaid, kept and continued for a long space of time, to wit, from &c., and

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thereby, and from no other cause whatsoever, during all the time aforesaid, divers large quantities of the refuse and foul water and other filth arising and proceeding from the said messuage and premises of the plaintiff, have been and still were prevented from running, flowing, and passing off in their usual course through and out of the said channel, drain, gutter, or sewer, in the manner aforesaid; and by reason thereof, not only divers noisome, noxious, and offensive smells &c. during all the time aforesaid have ascended &c. into the said messuage, dwelling-house, and premises of the plaintiff, but also thereby the said premises &c. of the plaintiff became and were greatly overflowed and wholly untenantable, and the plaintiff and his family thereby had been and were greatly annoyed &c. in the occupation, possession, and enjoyment thereof and the defendants furthermore, on the same day and year aforesaid, and on divers other days and times &c. wrongfully, injuriously, without leave, and against the will of the plaintiff, erected, put, and placed close to the said wall of the plaintiff, divers large quantities of brick, mortar, stone, wood, and other materials, and divers erections and buildings, and the same respectively there kept and continued for a long space of time, to wit, &c., so near to the said wall and to the thatch thereof, that by reason thereof, and from no other cause whatever, the rain which from time to time descended to and fell upon the thatch of the said wall, was wholly prevented from dripping and falling from the thatch thereof, in manner aforesaid, as the same ought to have done; and in consequence thereof great quantities, to wit, ten perches of the said thatch, and of the covering and coping of the said wall, had respectively become and been greatly rotted, decayed, damaged, injured, and destroyed, and by reason thereof not only the plaintiff, during all the time aforesaid,

use and advantage of the said wall, but also by
f the said thatch, covering, and coping of the
ll having been so damaged and destroyed as
d, large quantities of rain and moisture have
ne to time, during all the time aforesaid, fallen
d penetrated into the said wall of the plaintiff,
same has been thereby greatly injured and
ed, and has been rendered ruinous, insecure,
pidated, so that by means of the several pre-
foresaid, the plaintiff hath been, during all the
oresaid, greatly inconvenienced, &c.

: first, not guilty. Secondly, as to the part of
l declaration which relates to the said channel,
gutter, or sewer, in the said declaration men-
the defendants say, that the surplus of foul
or other filth which from time to time arose,
llected and proceeded from the said messuage
nises of the plaintiff, was not during all the time
id used and accustomed, nor of right ought to
flow, pass, and be carried away from and off the
emises of the plaintiff into the premises of the
ants, in manner and form as the plaintiff hath
said declaration in that behalf alleged; con-
g to the country. Thirdly, as relates to that part
declaration which relates to the eaves and thatch
said wall in the said declaration mentioned, the
ants say, that the plaintiffs ought not to have or
in &c., because they say that the plaintiff was
ring all the time aforesaid entitled to the benefit,
nt, privilege, and advantage of having and per-
g the eaves and thatch of the said wall to extend
oject a convenient space beyond and from the
all, over and upon the said premises so as afore-
the possession or occupation of the defendants,
convenience and use of conveying and carrying
d from her said wall and thatch thereof the rain

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which from time to time descended and fell thereupon. Conclusion to the country. Upon these pleas issue was joined.

At the trial before *Patteson* J. at the last *Devonshire* assizes, the following appeared to be the facts of the case. *Joseph Thomas*, the father of the defendants, being seised in fee of the land and premises occupied by the defendants at the time of the alleged injury, purchased the adjoining premises occupied by the plaintiff at the time of the alleged injury, and in which there was a term of 500 years. By his will, dated 18th *April* 1816, the beneficial interest in the former property was devised to his wife for life, with remainder in fee to his son *J. V. Thomas*, one of the defendants; and the beneficial interest in the latter property was bequeathed for the residue of the term of 500 years to his wife for life, and afterwards to his son *William*, the husband of the plaintiff. The testator died on 28th *May* 1820, having made one *Wreyford* the trustee under his will, in whom the legal estate in all the property vested. The defendants, for some time after the death of their father, occupied the premises in question as tenants from year to year, but on the 10th *April* 1834, a lease of those premises was granted by *Wreyford* and Mrs. *Thomas*, the mother of the defendants, to the defendant, *J. V. Thomas*, for 60 years, in case Mrs. *Thomas* should so long live. Both the defendants continued to carry on their business upon the premises. The plaintiff was in the actual possession of the other premises held for the residue of the term of 500 years, having been put into possession by *Wreyford* in the month of *May* 1834. It appeared that at one period of time, after the death of *Joseph Thomas* the testator, and before the lease to the defendant *J. V. Thomas*, *Wreyford* the trustee was in possession of both sets of premises. The defendants admitted the obstruction of the drain, but disputed the

ıtiff's right to that easement. As to the right to easement of eaves dropping, it appeared that about :een years since the top of the plaintiff's wall was :red with pantiles, which projected several inches, but upon the buildings being accidentally burnt the wall raised about three feet, and so thatched that the ch projected some inches further than the pantiles done. The dropping of the water from the plain- ' eaves was obstructed by the defendants building a close up to that of the plaintiff, and standing not ' within the space over which the thatch projected, also within that over which the pantiles had formerly jected. The easements of the drain and eaves drop- ; were proved to have existed for more than twenty rs, and the defendants admitted that they had ob- ıcted them, but contended that the plaintiff's right them was determined by the unity of possession of premises in *Wreyford* the trustee. To this it was wered, that as the estate in the set of premises ›nging to the defendants was a seisin in fee, while : in the premises of the plaintiff was only a chattel rest, there could not be a unity of seisin in *Wrey-* l the trustee; and also, as to the eaves dropping, : the plaintiff having altered the height of the , and substituted the thatched for the tiled roof, determined the plaintiff's right to that easement. dict for the plaintiff, damages 40*s*. Upon the first ıt, the defendants had leave to move to enter a non-

rle moved to enter a nonsuit, or for a new trial. to the easement claimed of permitting the eaves of plaintiff's house to project over the defendants' nises, so as to carry off the rain falling on the ıer, the defendants were justified in building up r wall in the manner complained of as if no ease-

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ment had ever existed; for the heightening the plaintiff's wall, and extending the projection of her roof, were such material alterations in the enjoyment of her right as destroyed it. Were this otherwise, the plaintiff's wall might be raised to any height, and the projection of her roof might be indefinitely extended to the annoyance of the defendants. Easements of this kind being in their nature infringements of the rights of another, must be strictly pursued. Thus a qualified right of using a road for carrying corn or manure does not justify the carrying lime or the produce of a quarry; *Jackson* v. *Stacey*(*a*). [Lord *Abinger* C. B. Here was a question for the jury, whether there had been adverse enjoyment of this easement for twenty years, and they found that there had.] The extent of grant to be presumed from such adverse enjoyment should not be carried beyond the limits fixed by the actual user during the last twenty years. [*Alderson* B. Can the plaintiff, by claiming more than she is entitled to, destroy her right to that part which she can legally claim? To take the instance of light, many cases show, that if a party enlarges an ancient window, only the enlarged part of it can be obstructed by the owner of the adjoining land, and the light of the ancient part cannot be diminished (*b*). Now if this act of the defendants is injurious to the plaintiff's old right of a projection of four inches to carry off water from her roof; it is not the less so if it turns out to be injurious to a more extensive right which she claims. As to the alteration of the user, the only difference is, that the drops fall from a higher spot than before, which is not shown to prejudice the defendants.] Secondly, the

(*a*) Holt's C. N. P. 455.

(*b*) *Luttrell*'s case, 4 Rep. 87 a; *Chandler* v. *Thompson*, 3 Camp. 80; *Martin* v. *Goble*, 1 Camp. 322.

t to both easements was extinguished by the unity ossession in *Wreyford* the trustee. His possession of ı sets of premises put an end to these rights, which ould not then claim against himself, as he might : done, had he been possessed of one set only. ın the defendants, who took under the plaintiff, d only take such interests in their respective pre- ıs as he himself held, viz. discharged of the ease- ıt. A right of way over the land of another, being ınst common right, is extinguished by unity of pos- ion of the land in respect of which it is claimed and hat over which it passes (*a*).

ord ABINGER C. B.—The verdict was right, for possession by *Wreyford* the trustee, of both sets premises, only suspended the easement without ex- ıuishing it; so that when they again came into the ds of different tenants the former right revived.

OLLAND B. concurred.

ALDERSON B.—In this case a single party was seised freehold premises, and possessed of leasehold pre- es next adjoining. An easement had previously n enjoyed by the occupiers of one set of premises ıgainst the occupiers of the other. While both sets e in the same hands, the easement claimed was not uired to be exercised, but the right to it remained withstanding; for there was no unity of seisin by ch it could be extinguished. Then when the pre-

(a) *Jordan* v. *Atwood*, by three justices against two, Roll. Abr. tit. *Ex-tinishment*, (C.) pl. 8, reported 11 Vin. Abr. 446. But see *contrà*, 11 . 7. 25 b. per *Vavasor;* and the different report of *Jordan* v. *Atwood*, Owen's Rep. 121.

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mises were divided and passed into different hands, the right revived.

GURNEY B. concurred.

Rule refused (a).

(a) In *Canham* v. *Fisk*, 2 Tyr. R. 155. *Bayley* B. said, "Unity of possession merely suspends a prescriptive easement, there must be an unity of ownership to destroy it." So that no extinguishment of a prescriptive easement is worked by mere unity of possession, unless the party has an "estate in the land *a quâ*, and in the land *in quâ*, equal in duration, quality, and all other circumstances of right;" see *Rex* v. *Inhabitants of Hermitage and others*, Carthew, 239, 241; where at a trial at bar, it was held, that a fee simple determinable in one parcel of lands, and a pure fee simple in another, prevented the extinguishment of a prescriptive right of common; and see *Hemden* v. *Crouch*, cited arguendo, 3 Bulstrode, 339; Popham's Rep. 167; 11 Viner, 442. Again, tenements can only be discharged from rent service, profit *à prendre* &c., due to the lord, by the lord's grant of such service, &c. to the tenant, unless the latter "has by such conveyance, as great, high, and 'perdurable' an estate in the tenements as the lord has in the rent or seignory, for then only are the latter gone for ever; see Littleton, sections 560 and 561; Co. Lit. 313 a and b; and if the union of the land with the rent be only temporary, *e. g.* if the conveyance of the land be only for a particular estate of less duration than that which the party has in the rent, the rent is then only suspended and not extinguished; see Gilbert on Rents, 150. So a charge on land coming to the same person who is entitled to the land, is only suspended and not extinguished on this account, unless he has the same interest in both charge and land; *Price* v. *Says*, Barnardiston's Chancery Reports, 125, and cases there cited by Lord *Hardwicke* Ch.

The expression "unity of possession" seems to have been frequently used either without reference to the above well-established distinction, or with the implication that "possession," which may be of a smaller estate than a fee, would be understood as synonimous with "seisin." Thus in *Whalley* v. *Tompson*, 1 Bos. & Pull. 375. *Eyre* C. J. is reported to have said, that "from the moment that the possession of two closes is united in one person, all subordinate rights and easements are extinguished;" but it appears from what he subsequently says, that he contemplated that possession being in right of an estate of fee simple in the owner of both closes, for he adds, that "no right (of road) could exist in the owner *independent of the fee simple*." So in the case cited by the reporters from *Brook*'s Abr. *Extinguishment*, pl. 15. in their note to *Whalley* v. *Tompson*, assuming that the unity of possession in *J. S.* there stated, was in truth a unity of seisin in him in fee of both closes, (which seems the fact, for partition was made after his death among his daughters,) the way would be a new one, as is added by *Brook*; but if it was only a unity of possession, without seisin in fee in

au-gutters, *stillicidia*, and the like; for though while they are in
ıd they may be stopped or foredone, because a man cannot be
rrong himself; yet if they be divided, things of that nature (still in
revive, because they are of no less use of themselves in one hand,
divers, being equally (*rebus stantibus* in the same use and occu-
necessary for the several houses to which they belong; but clearly,
uch things be foredone or altered *while they are in one hand*, and so
he houses be again divided, they cannot be restored by law, but
taken as they were at the time of the conveyance;" *Robins* v. *Barnes*,
131. See also *Lady Brown's* case, cited in *Surey* v. *Pigot*, Noy, 84.
ı the difference between a way or a common, which may be extinct
y, and a watercourse which begins only *ex jure naturæ*, see per
k J., *Sury* v. *Piggot*, 3 Bulstrode, 340; *S. C.* Noy, 84; Latch.
l nom. *Shewry* v. *Pigot*, Jones R. 145. And as to the right of
um, see Year Book, 18 *Edw.* 3. 22 b. 2 Rol. Abr. tit. *Nusans* (G),
sten's case, 9 Rep. 54 a. Com. Dig. Action on the Case for Nuisance

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WOOD *against* WILSON.

JUMPSIT on an award. The declaration al-
eged that certain differences had arisen, and were

In assumpsit on an award for 223*l.* 4*s.* 6*d.*, the de-

t set out in his plea the award, reciting, that by agreement in writing between
intiff and defendant, setting forth that they had for some years carried on
s as builders and excavators in copartnership, and that they had, in pur-
of the partnership, become possessed of certain messuages and premises,
, chattels, and effects, and that disputes had arisen between them touching
counts, reckonings, and dealings, and as to a division of the said partnership
ges &c., and other their estate and effects, and that they had agreed to refer
ter to the decision &c. of two arbitrators named, who should have power to
a *division* of the messuages &c., and other the partnership effects between
nd that each party thereby agreed to execute to the other a conveyance of the
ges &c., according to such division between them, as the arbitrators should
After further reciting that the partnership had been dissolved by mutual
t, the award directed that the defendant should pay the plaintiff 223*l.* 4*s.* 6*d.*
of all demands in respect of his one equal moiety, half-part, or share of the
partnership property, estate, and effects; and that on payment thereof, and
ing such conveyances as thereinafter mentioned tendered to him for execution,
aintiff should, at the defendant's request, execute a proper conveyance unto

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depending between the plaintiff and defendant, touching and concerning their accounts, reckonings, and dealings, and as to a division of certain copartnership messuages, lands, buildings, and other the estate and effects of the plaintiff and defendant, of which they were possessed in pursuance of a partnership between them, that these differences were referred to one *J. Cooper* and *W. Barley*, with power to name an umpire, which they did; and the arbitrators afterwards awarded, that the defendant should pay to the plaintiff the sum of 223*l.* 4*s.* 6*d.* in full of all demands in respect of his one equal moiety of the copartnership property. Breach, non-payment thereof.

Plea, that the award was a certain award, whereby, after reciting, that by an agreement in writing, duly signed, bearing date &c., made between the defendant of the one part, and the plaintiff of the other part, which recited that the defendant and the plaintiff had for some years then last past carried on, at &c., the business of builders and excavators in copartnership, and that the defendant and the plaintiff, during the said copartnership, had become, in pursuance of the said copartnership, possessed of or entitled to certain messuages, lands, buildings, and premises, sum and

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and to the use of the defendant, of, in, and to certain messuages &c. therein mentioned, subject to certain mortgage debts charged thereon. Also, that all the debts then due and owing to and from the copartnership concern, should be received and paid by defendant and plaintiff in equal proportions, and that if either should advance or pay any sum over and above his half-share of the partnership debts, the amount so overpaid should, on demand, be made good, and repaid to the party paying the same by the party making default. The plea then proceeded to allege, that the several messuages, &c. directed by the award to be conveyed to the defendant, were the whole of the said copartnership messuages &c., and that there were not in the award any other provisions than those above specified concerning the said copartnership property, estate, and effects, or the division thereof, or any part thereof: Held, on demurrer to the plea, that the award was final as well as sufficiently certain and consistent; but *semble*, that if on motion to set aside the award made in due time, it had appeared that there had been no arrangement between the partners by which the messuages &c. were awarded to one, subject to the mortgages on them, the arbitrators would have been considered to have exceeded their authority in not dividing them between the parties.

of money, and other chattels and effects; and that differences and disputes had arisen between the parties touching their accounts, reckonings, and gs, and as to a division of the said copartner- messuages, lands, buildings, and other their estate effects; and that for the amicable decision of such nces and disputes, the said parties thereby l to refer &c., and that the said arbitrators, or o of them, should have power to direct a division said messuages, lands, buildings, and premises, ther the partnership effects between them, and ach of the said parties thereby further agreed to te to the other a conveyance &c., according to division between them &c.: and after reciting the ntment of the umpire, and the enlargement of the " after further reciting that the said partnership en the defendant and the plaintiff was dissolved tual consent on &c. then last, they the said *J. C.*, c., declared that they having taken upon them- the burthen &c., and having heard and exa- l &c., did thereby make and publish that their l in writing of and concerning the matters so red to them, in the manner following; that is to they did thereby award, order, and direct, that lefendant should, on &c. then next, between the &c., well and truly pay or cause to be paid unto laintiff, at &c., the sum of *223l.* 4*s.* 6*d.* in full of mands of his one equal moiety, half-part, or share e said copartnership property, estate, and effects, hat upon payment thereof, and upon having such yances as thereinafter mentioned tendered to for execution, the plaintiff should, at the request of the defendant, execute and deliver a proper yance &c. unto and to the use of the defendant, eirs and assigns, of all the right &c. of him the tiff, of, in, and to certain messuages &c. therein

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mentioned, subject to mortgage debts of 700*l.* and interest, and 700*l.* and interest, therein also mentioned and charged on the said messuages &c., and in which said several conveyances should be contained proper covenants on the part of the defendant, his heirs, executors &c., that he and they would satisfy the said two several principal sums of 700*l.* and 700*l.* and interest, and indemnify &c. for the same: and they did thereby further award &c., that all debts due and owing to and from the said copartnership concern, should be received and paid by the defendant and the plaintiff in equal proportions, share and share alike; and that if either party should advance or pay any sum or sums of money over and above the half share or proportion of the said copartnership debts, then and in such case the amount so overpaid should on demand be made good and repaid to the party paying the same by the party making default in payment thereof; and that upon such payments being made, and conveyances executed as aforesaid, each of the said parties respectively should, if required, execute and deliver to the party requiring the same a general release, &c." Avernment, that the said several messuages &c. in the said award mentioned and directed to be conveyed to the defendant, were the whole of the said copartnership messuages &c., and that there is not in the award any other provision than those therein before specified concerning the said copartnership property, estate, and effects, or the division thereof, or any part thereof. Verification. General demurrer and joinder.

Gobling for the plaintiff supported the demurrer. The first objection to the award is, that it is not final, because the debts to and from the concern are not ascertained, and a further settlement will be required before they can be "received and paid by the plaintiff

defendant in equal proportions." But the dif-
ice alleged is between the plaintiff and defendant,
not between them and their customers. [*Parke* B.
ing shows that there was any dispute as to the
owing to or from the firm.] Nor is the award un-
in for not minutely directing how the debts are to
ceived or paid in equal moieties, any more than for
lirecting in what manner the defendant is to go to
the plaintiff, whether on foot or not. [*Alderson* B.
could it be otherwise expressed? The reim-
ement of both parties is provided for in case one
aced more than the other. Nor can the ground
inconsistency hold under the circumstances.] The
trators are also said to have exceeded their autho-
in awarding the premises to one, and not having
led the premises. But the submission left it open
em to make that arrangement if it appeared best.
cited *Sugden* on Powers, 471, 5th edit.

Wightman for the defendant. The award is plainly
nsistent, for the defendant is ordered to pay
4*s.* 6*d.* in full of all demands in respect of the
tiff's one equal moiety of the copartnership pro-
y, estate, and effects, and yet he is afterwards
ded to have a moiety of the debts due to the
ern. [*Alderson* B. The word "effects," as there
, neither includes debts nor the mortgaged pro-
y. *Parke* B. By "effects" is rather meant property
ssession than choses in action, which debts are.] At
vents, the mortgaged premises could not be given
ne partner, for the others must have had a share in
, which ought to have been ascertained and
ded to him. What power did this submission give
n to direct a purchase by one partner of the other's
re? That is the effect of the award.

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PARKE B.—What is there on these pleadings inconsistent with there having been an agreement between these partners, for one of them to take to all the messuages and property, subject to any mortgages, which agreement has been laid before and enforced by the arbitrators? If there was no such thing, I should doubt whether this award was a proper execution of the arbitrators' power to divide the mortgaged property. It is however too late to take advantage of that point, which could only be done by a motion in proper time to set aside the award on affidavits. In all probability the partners agreed on a division of the property, with an agreement that the defendant was to purchase the mortgaged premises.

Lord ABINGER C. B. BOLLAND and ALDERSON B. concurred.

Judgment for the plaintiff.

LINLEY *against* POULDEN and Another.

Where in a country cause issue is joined in vacation, and notice of trial given for a particular day in the next term before the sheriff, but the plaintiff does not proceed to try pursuant to such notice, it is premature to move for judgment as in case of a nonsuit in town causes. *Semble*, that costs of the day for not proceeding to trial moved for in the same term, if notice of trial was not countermanded in time *Reg. G.* of the court of Exchequer, E. 1824, and *Reg. G.* of all the courts *W.* 4. No. 70.)

ISSUE was joined before this term, and notice of trial was given for 24th *April* in this term, before the sheriff of *Yorkshire*. The trial did not take place, and a rule for judgment as in case of a nonsuit was obtained.

Robinson showed cause. The motion is premature for judgment as in case of a nonsuit cannot be moved for in the same term in which the default to try t

, and when no countermand of the notice of trial
ıra. *Begbie* v. *Grenville* (*a*).

ıbett in support of the rule. As issue was joined
e the term, this rule might be moved for in this
: In *Howell* v. *Powlett* (*b*), Chief Justice *Tindal*
s the general understanding to have been, that
ever a party has given notice of trial, he is bound
roceed pursuant to it, and if he fail to do so,
defendant is entitled to move for judgment as in
of a nonsuit. There the plaintiff had given notice
rial earlier than he need have done, and was not
itted to recede from the consequence of not trying
rding to his notice. [Lord *Abinger* C. B. In that
the notice of trial was not given for a day in term.]
Butterworth v. *Crabtree* (*c*), *Parke* B. says, that if a
ıtiff waives the practice as to the time of bringing
ıntry cause to trial, by giving notice of trial at a
icular sheriff's court, he must proceed to trial pur-
t to his notice, and according to the practice of the
t. Were this rule relaxed, the consequence would
hat, in *20l.* cases sent to the secondary of *London*
rial, defendants might, twice in each week during
, be harassed by repeated notices of trial, without
g able to move for judgment as in case of a nonsuit.
lerson B. In that case the plaintiff would be bound
ay the defendant his costs of every day for which
ce of trial was given without proceeding to try; so
ıardship would arise.] Repeated countermands of
ice of trial would prevent that remedy to the de-
ıant. By Reg. Gen. of this court, *East.* 1824 (*d*),

(a) 2 Dowl. P. C. 238.

(b) 8 Bing. 272; and see *Hay* v. *Howell and others*, 2 New Rep. 397.

(c) *Ante*, 149; and see *Wright* v. *Skinner*, Tyr. & Gr. 69, *Mich.* 1835; *Ker* v. *Wilson*, 3 Dowl. P. C. 658; *Williams* v. *Edwards*, *id.* 660; *Baddeley* v. *Atty*, 3 Dowl. P. C. 205; *Lenney* v. *Poulter*, *id.* 650.

(d) Macleland's R. 708.

this case from *Grenville v. Deyde.* The r
enter the issue for trial may account for t
the old practice, as but one step could be
term, but no such entry of the issue need n
this motion. Reg. Gen. Hil. 2 *W.* 4. No.

Lord Abinger C. B.—The officers certif
the practice of this court does not require
proceed to trial according to their notices, v
notices are for trials *in* term, and we adh
rule.

Parke B.—In *Tidd,* 9th ed. 764. it is
where notice of trial is given in a *town* caus
ting *in* or after term, the defendant may mov
ment as in case of a nonsuit in the next term
term after that in which the issue (by the ol
ought to have been entered. I accede to th
in this case. It is not sworn that the defenda
the expense of bringing up his witnesses,
costs of the day would have been added o
If he did, there must be a distinct motion.

Bolland and Alderson Bs. concurred.

Rule discha

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BAISLEY, Assignee of the Sheriff of MIDDLESEX, *against* NEWBOULD and two Others, his bail.

THE defendant was arrested by the sheriff of *Middlesex* on *February* 18th, the day on which the writ bore date, and a bail-bond was given on the same day. The time for justifying bail expired on the 4th *March*, without their doing so. After the time for putting in bail was out, before special bail had been perfected, and after the bail-bond forfeited (*viz.* at one o'clock on 4th *March*), a declaration was delivered *de bene esse*, with a notice indorsed to plead in eight days; venue, *Surrey*. The plaintiff having proceeded on the bail-bond, (which was assigned to him on 27th *March*), *Wightman* obtained a rule to stay proceedings on it, saying the *Surrey* assizes were not till the 30th *March*, so no trial had been lost. The only question argued was, whether the plaintiff had declared de bene esse in time; *Chandless*, for the plaintiff, contending, that as the time for entering an appearance and putting in bail had elapsed, he was too late to do so; and mentioning *Reg. Gen. Mich.* 3 *Will.* 4. s. 11., and *Hil.* 2 *Will.* 4. No. V., which last rule was made before the passing of 2 *Will.* 4. c. 39.

Since the new rules of *Hil.* 4 *Will.* 4. the plaintiff may declare de bene esse under No. 11, of *Reg. Gen. Mich.* 3 *Will.* 4. at any time after the expiration of eight days from the service or execution of the writ (2 *Will.* 4. c. 39. s. 11. and sched. No. 4.) and before bail above are perfected, or whether they have been put in or not, so that the bail-bond will stand as a security, on stay of proceedings against the bail (*Reg. Gen. Hil.* 2 *Will.* 4. No. V.)

PARKE B.—It was held in *Wendover* v. *Cooper* (a), that in a bailable action the plaintiff may deliver the declaration conditionally at any time before the special bail are perfected, though after the time had expired for the defendant to put in bail. The real question, therefore, is that which has occurred to some of the judges, whether, since the new rules made in pursuance of 2 *Will.* 4. c. 39., a plaintiff can declare de bene esse at all? If he can, this bail-bond must stand as a security; if he cannot, no trial can ever be lost. We

(a) 10 B. & Cr. 614.

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shall confer with the other judges, and in the meantime the rule will be absolute for staying the proceedings only.

Cur. adv. vult.

In *Trinity* term, PARKE B. delivered judgment.—This case stood over for consideration and conference with the judges of the other courts, on the construction of the eleventh rule of *Mich.* 3 *Will.* 4. A doubt was entertained, whether by that rule it was intended to give the plaintiff the opportunity of declaring de bene esse, whether special bail had been put in or not, or only in a case where they had been put in but not perfected. On the interpretation to be put on the rule one way or the other, depends the application of it as to the bail-bond's standing as a security. If the latter were the right construction, we should have to consider some other rule, which might be framed to meet the difficulty. But the judges, on conference, think that the right to declare de bene esse is not taken away or limited, and that the plaintiff may still declare de bene esse at any time after the expiration of eight days, and before bail above are perfected, and whether they have been put in or not.

Rule absolute, the bail-bond to stand as a security (a).

(a) See *Hodgson* v. *Mee*, 5 Nev. & M. 302.

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STARLING *against* COZENS and three Others.

A declaration in trespass against four defendants, contained two counts, one for assault, the other for seizing a fishing net. The verdict was against one defendant on the first count, and for him on the other under 7 & 8 *Geo.* 4. c. 29. s. 35., and for all the other defendants on both counts: Held, that the defendant, who was found guilty of the assault, was entitled to deduct the costs of a witness called in his defence on the second count only, from the plaintiff's costs on the first count; but was not, as it would seem, entitled so to deduct the costs of other wit-

[TRESPASS for assault and battery, with a count for taking a fishing net from the plaintiff. Plea, ot guilty, under 7 & 8 *Geo.* 4. c. 29. s. 35. At the ial before *Parke* B. the defendants justified taking e net under 7 & 8 *Geo.* 4. c. 29. s. 35., on the ground at plaintiff was found fishing with it in a private river, owing through land belonging to one of the defendnts. The jury found the defendant *Cozens* guilty n the first count, of throwing the plaintiff into the ver, but acquitted him on the second, and gave a eneral verdict for the other three defendants on both ounts. The master, on taxation, would not suffer *ozens*'s costs on the second count to be deducted om the costs payable by him to the plaintiff on the st count, and would not allow the three other dendants their costs.

Thesiger obtained a rule to review the taxation, on the thority of *George* v. *Elston* (*a*), and *Griffiths* v. *ynaston* (*b*).

Wordsworth showed cause. The three witnesses r *Cozens*, on the second count, were equally necesary to his defence on the first, so that their expenses ave been properly disallowed, as not payable by the laintiff to him, and consequently, as not to be de-

(*a*) 1 Bing. N. C. 313. (*b*) *Ante*, Vol. II. 757.

nesses called for the defence on the second count, who were also examined as to the irst. Held also, that as the other three defendants must be taken primâ facie to have joined the first in employing the attorney, they were each entitled to a fourth share of their costs, to be paid them by the plaintiff, or set off against the costs payable to him by the defendant, who was found guilty; unless indeed it should appear to the master on taxation, that the attorney was employed on the sole responsibility of that single defendant, without any retainer by the rest.

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ducted from the costs payable by him to the plaintiff on the first issue. The evidence for the defence showed the three last defendants to be wholly innocent of the act of assault, which was quite distinct from seizing the net, *Richards* v. *Cohen* (*a*). [*Parke* B. The evidence of *Bosanquet*, one of the defendants' witnesses, only applied to the taking the net. The master should have allowed the defendant *Cozens* his costs, to be deducted from the plaintiff's.] As it does not appear that the three other defendants employed the attorney, or incurred any costs, they have no right to extra costs.

PARKE B.—Primâ facie all the defendants must be taken to have employed the attorney to defend the action; so that as each, if the defence failed, would incur liability to pay a portion of the plaintiff's costs, so each, if successful, would be entitled to be allowed a fourth of their costs to be paid by the plaintiff. For it was laid down by *Bayley* B. in *Griffiths* v. *Kynaston* (*b*), after conference with the other judges, that the old practice of allowing only 40*s*. costs to defendants who have been acquitted, is not correct, and that they are entitled to an aliquot proportion of the costs, according to the number of defendants on the record. But it will be a subject of inquiry by the master, whether the three defendants, who were altogether acquitted, employed the attorney; if they did not, and if the attorney was employed on the sole responsibility of *Cozens*, they will not be so entitled; but if they did, *George* v. *Elston* (*c*) shows, that the costs to which the acquitted defendants are entitled, may be set off against the damages and costs payable to the plaintiff by the defendant who

(*a*) 3 Dowl. P. C. 533. (*b*) *Ante*, Vol. II. 757.
(*c*) 1 Bing. N. C. 513.

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has been found guilty. The defendant, *Cozens*, will at all events be entitled to full costs on the second count, as between attorney and client, pursuant to 7 & 8 *Geo.* 4. c. 29. s. 75. which provides, that if in any action brought for any thing done in pursuance of that act, a verdict shall pass for the defendant, he shall recover his full costs as between attorney and client.

Rule absolute for reviewing the taxation.

WHITEHEAD *against* PRICE and Others.

COVENANT. The declaration stated, that heretofore, to wit, on 23 *March* 1833, by a certain deed-poll, being a policy of insurance then made and

The defendants insured against fire certain cotton-mills, millwright's work, including standing and going gear therein, with engine-house adjoining, and the steam-engine therein. The policy recited, that the buildings were brick built and slated, warmed exclusively by steam, lighted by gas, &c. worked by the steam-engine above mentioned, in the tenure of one firm only, standing apart from all other mills, and worked *by day only*. The mills &c. were consumed by fire, and the insured sued on the policy. Held, that these words referred not to the steam-engine, or any part of the gear, but to the mill only: so that shafts which passed through the cotton-mill might be kept turning and moving by the steam-engine by night, to keep other mills going, so long as the insured cotton-mill was not worked, except by day. By a condition of the policy it was stipulated, that every insurance attended with particular circumstances of risk, arising from the situation or construction of the premises, or the nature of the trade carried on, was to be specially mentioned in the order given for the policy, so that the risk might be fairly understood; and that if not so expressed, or if any misrepresentation should be given &c., or if after the effecting the insurance the risk should be increased by carrying on any "hazardous trade, operation or process, or hazardous communication," the insured would not be entitled to any benefit under the policy. To an action on the policy it was pleaded, "that after the making the policy, the steam-engine therein mentioned was worked by night, and not by day only, whereby the risk in the said policy was increased:"—Held, that the plaintiff would be entitled to judgment, were a verdict entered on the plea, it being bad for not averring that particular circumstances of risk existed, which were not expressed in the order given for the policy, or were misrepresented, or that after the assurance had been completed an alteration had been made by which the risk was increased, or that a hazardous trade, operation, process, or communication was carried on which was not carried on when the policy was effected.

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sealed with the respective seals of the defendants, being directors of a certain company called *The Protector Fire Insurance Company*, (profert) after reciting that the plaintiff and one *Mayall*, who died before the commencement of the suit, had paid the sum of 32*l.* to the directors of *The Protector Fire Insurance Company* in *London*, and had also agreed to pay the sum of 32*l.* yearly on the 25th *March*, during the continuance of the said policy, for insurance from loss or damage by fire, the property thereby described not exceeding the sum specified under each head of insurance; namely, on the larger end of a cotton-mill, called *Union Mill* (A.) 1800*l.*: on millwright's work, including the standing and going gear therein, 200*l.*; on the smaller end of the said cotton-mill (B.) 900*l.*; on millwright's work, including the standing and going gear therein 100*l.*; on the engine-house adjoining the larger end of the said mill, and being under the same roof therewith (C.) 400*l.*; on the steam-engine therein, 350*l.*; on the warehouse communicating with the said mill by a staircase, the upper room of which was used for blowing and scutching cotton in, 250*l.*; and reciting, that the aforesaid buildings were brick built and slated, situate near *Oldham*, in the county aforesaid; warmed exclusively by steam, lighted by gas from the *Oldham Gas Light Company's Works*, which gas in the blowing and scutching room was inclosed in glass, worked by the steam-engine above mentioned, in tenure of one firm (Messrs. *Bowden, Gartside* & Co.) only, standing apart from all other mills, and worked by day only, and that the marks had reference to a plan of the building on the order for the said insurance, the said defendants did covenant and agree with the said *J. Whitehead* and *J. Mayall*, that from the 25th of *March* 1833, to and inclusive of the whole of the 25th of *March* 1834, and so long as the said insured should

or cause to be paid the sum of 32*l.* at the time ·ein above mentioned, and the directors for the : being should accept the same, the stock and ls of the company should be subject and liable ·ay or make good to the said insured, their execu-, administrators, or assigns, all such loss or damage hould happen by fire (except loss or damage by happening by any invasion, foreign enemy, or civil ımotion, or any military or usurped power what-r) to the property above mentioned, amounting in whole to no more than 4000*l.*, according to the con-ons indorsed on the said policy, as by the said icy, reference being thereunto had, will more fully ɔear: And the said plaintiff further says, that the l conditions in and by the said deed or policy men-ıed and alluded to are as follows; (that is to say) ·st, that every person desirous of effecting an in-ance must state his name, place of abode, and upation; he must describe the construction of the ldings to be insured, where situate, and in whose upation; of what materials the same were respec-·ly composed, and whether occupied as a dwelling-ıse, or otherwise. Also, the nature of the goods or er property on which such insurance might be pro-ed, and the construction of the buildings containing h property. *Secondly*, that every insurance at-led with particular circumstances of risk, arising n the construction of the premises or the nature :he trade carried on, or the goods therein, was to specially mentioned in the order given for the icy, so that the work might be fairly understood; ɔot so expressed, or if any misrepresentation be en, so that the insurance be effected upon a lower mium than ought to be paid; or if buildings or ds be described in the policy otherwise than they lly were; or if after an insurance should have been

directors, and on the terms they mig
entitled to any benefit under his policy.
all the conditions material to be stated.]

The declaration afterwards averred,
making the policy, to wit, on the 2d of
a certain memorandum in writing, indo
said deed or policy, by the direction
privity and consent of the said defe
declared that the boilers belonging to th
which worked the mills described in tl
being completely outside the buildings
said policy, and the two portions A. a
mill being completely detached from
the premium from *Lady-day* 1834
thenceforward annually, should be redu
centum, say in the whole 28*l.*, subject
vious conditions and warranties, as by
with the said memorandum indorsed th
ence being thereunto had, will more ful
then averred, that the plaintiff and *Ma*
time, at the time of making of the po
thence until the loss thereinafter me
jointly interested in the insured pr
amount of money insured, and that the
in the said policy mentioned and so in
said, afterwards, to wit, on &c., were b

o be effected on a lower premium than ought to have ›een; and then alleged performance of all the other onditions mentioned in the policy.

The defendants pleaded eight special pleas; but ıe question turned only on the sufficiency of the ›urth and sixth. The fourth plea was, that the eam-engine and certain parts of the gear in the olicy of assurance mentioned, and after making of the ıid policy and memorandum, to wit, on 1st *May* 1834, nd on divers other times between that time and the estruction of the premises by fire, as in the said eclaration mentioned, were, without the leave or con-nt of the said defendants or of the directors of the ıid company, worked by night and not by day only, ntrary to the tenor and effect, true intent and mean-g of the said deed and policy of assurance and emorandum. The sixth plea was, that after the aking the said writing or policy of assurance and emorandum, to wit, on the 1st of *May* 1834, and on vers other days and times between that day and the estruction of the said premises in the declaration entioned, the said steam-engine in the said deed or olicy mentioned, was worked by night and not by ay only, without the licence &c. of the said defend-ıts or the directors of the said company in the said olicy mentioned, whereby the risk in the said policy assurance was increased, and so the defendants y, that the plaintiff and *J. Mayall* thereby, and by ason of not having the consent of the said defendants the directors of the company, ceased to be entitled any benefit under the said policy of assurance and emorandum.

Replication to the fourth plea, that the said steam-ıgine was not, nor was any part of the gear in the ıid policy of assurance mentioned, after the making of

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the said policy, worked by night, and not by day only, in manner and form &c.

To the sixth plea, that the steam-engine in the said policy of assurance was not, after the making of the said policy, worked by night, and not by day only, in manner and form &c.

At the trial before *Alderson* B. at the last spring assizes for *Lancashire*, it appeared, that previous to the making the policy, certain interrogatories were put to the assured, one of which was, whether the mill was worked by night as well as by day? The answer was, that it was worked by day only, and not by night. The steam-engine was in a detached building, and communicated its power to the plaintiff's mill by means of shafts. Shafts were carried from it through the plaintiff's mill, so as to convey the moving power of the steam-engine to other mills. The plaintiff's mills were worked by day only, but the steam-engine was kept going all night, and the shafts which communicated its moving power to the plaintiff's mills, as well as to the mills, were also in motion all night. The defendants urged, that this was a "working by night," contrary to the policy. The learned judge gave the defendants leave to enter a verdict. Verdict for the plaintiff. A rule having been obtained according to the leave reserved,

Blackburne, Alexander and *Wightman* appeared to show cause; but having premised that the fourth and sixth pleas were bad, and that the plaintiff would be entitled to judgment non obstante any verdict which might be entered for the defendants upon the issues raised by them,

Cresswell, Tomlinson and *W. H. Watson* were called on to show, that the fourth and fifth pleas would afford a

ıfficient legal defence to the action, had a verdict :en entered on them for the plaintiff. First, as to e fourth plea, the policy recites that the buildings ere brick built, warmed by steam, lighted by gas, &c. *rked by the before-mentioned steam-engine*, in the nure of one firm only, standing apart from all other ills, and worked by day only. Those words must mprehend every part of the matters insured, every ing which was capable of being worked, *e. g.* standg and going gear, in order to prohibit and prevent orking by night with any part of it. But the aboveentioned "gear" was kept going by night, contrary the policy. The plaintiff's mill could only receive e moving power by the gear, as the medium of its plication to the other machinery, but the policy ipulates against working any part of this at night. he shafts are a part of the gear (*a*), and were kept oving and turning all night. Turning is the work ıey are adapted to perform, *viz.* in setting in motion ther articles for an ultimate object. But the working ıe steam-engine at night was a breach of the warranty hich is to be construed strictly. As to the sixth plea, he issue was, whether the steam-engine was worked ıt night. The consequent increase of risk is admitted on the plea. [*Alderson* B. The jury found there was no increased risk.] It is not put in issue. The fact of the engine being worked by night has been found; then it necessarily follows, that the allegation "whereby the risk in the policy of assurance was increased," is admitted. For being only matter of fact, and not an inference of law, it should have been traversed if not intended to be admitted; *Beale* v. *Simpson* (*b*). In *Lucas* v. *Nockells* (*c*), *Best* C. J. says, "the *virtute*

(a) See 3 Tyr. 612. *Trappes* v. *Harter*.
(b) Ld. Raym. 408.
(c) 4 Bingh. 729. Judgment of the court of Exchequer Chamber.

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cujus sometimes raises a mixed question of law and fact, and when this is the case, there may be a traverse, for that is the only mode by which the facts are to be settled on which the law depends." [*Parke* B. If the increase of risk was not put in issue, it would be an immaterial issue, and a case for a repleader. For the fact of working by night is immaterial, if the risk is not thereby increased.]

Lord ABINGER C. B.—We are called upon to put a grammatical construction upon a passage in this policy, and to say whether "steam-engine" is the nominative case to the word "worked," in the second place in which it occurs in the sentence in question, and I think it clearly is not. The next question is, whether "working" is satisfied by the turning of shafts? It has been pressed upon us in argument, that the upright shafts must be considered as part of the gearing or of the steam-engine, and the millwright's work as part of the mill, and that the keeping the shafts turning during the night was a "working by night," in contravention of the policy; but that is to confound the word "working" with the word "turning." Though the shafts were moving during the night, the mill was not working. The word "work" is not to be used in its popular sense. The interrogatory was, do you work it by night or by day? the answer is, we work it by day; that is, we work it by day only, our hands are on during the day only, and not during the night. I do not think that the mere moving or turning of the upright shafts is a "working" in the sense that has been ascribed to it. Something more must have been done to vacate this policy. Thus, it might have been sufficient for that purpose if the turning by night that which forms part of the machinery, had been attended with increased risk; but unless that

n so found, I think the policy must stand, and · judgment must be for the plaintiff.

:E B.—I am of the same opinion. The ques- ses as if this were a motion by the plaintiff for nt non obstante veredicto, on the fourth and leas, and turns on the validity of those pleas. ng, for the sake of argument, that both are to n to be proved to the full extent of these alle- it appears to me that neither of them affords swer to the action. The fourth plea is, that steam-engine, and certain part of the gear in l policy of assurance mentioned, were, after the of the said policy, and before the destruction said premises by fire, without the leave or con- the directors of the company, worked by night t by day only, and contrary to the tenor and true intent and meaning of the said policy. ng then that the steam-engine and part of the ay have been worked without the leave and : of the defendants, or of the directors of the ıy, by night and not by day only; the question ther that avoids the policy. That depends · upon the construction to be given to the words by day only" in the policy; language which, somewhat obscure, cannot, I think, be applied steam-engine or any part of the gear, but to the mill. That appears to me the fair construction erms of this part of the policy. The insurance ıe larger end, and another end of the mill called *ion Mill,* upon the building of the engine-house am-engine, and the building of the warehouse blowing and scutching of cotton. The policy "that *the aforesaid buildings* were brick build- d slated, lighted with gas;" (that applies to *all* ldings) "and *worked* by the steam-engine above

engine," and I, therefore, read this par
ance to be, that the cotton mill should
the steam-engine, and worked by day
result, it appears to me that this poli
cotton mill, which is worked by a steam-
day only. If this is the true meaning,
cotton mill having been worked excep
plea is no answer to the declaration. A
plea, it appears to me open to the same
fourth, unless it can be brought withi
condition indorsed on the back of the
provides, that when any insurance is
particular circumstances of risk, arising f
tion or construction of the premises, or fr
of the trade carried on, &c., such circur
be specially mentioned; or if any misrep
given, so that the insurance is effecte
premium than it otherwise would be,
avoided. So also, if there had been
increasing the risk after the insurance h
pleted, or if any hazardous trade, operat
was carried on, which was not so carr
time of the policy being granted, the poli
but there is no averment that there
operation carried on, which was not car
time the insurance was effected. as ther

the words "worked by day only," as contained in this policy. Now, on looking at the policy itself, and its subject-matter, I have no doubt that the mill, and the mill only, is the nominative case to the words "worked by day only." There is without doubt ambiguity on the face of the policy, but I think this the only safe construction.

ALDERSON B.—I quite agree with the rest of the court in the interpretation which they have put upon this policy. It seems to me, that its ambiguity arises from the position of the words having been changed. If after the words "worked by the steam-engine above mentioned," you read on "and worked by day only," there is no doubt that the latter words refer to the mill. That view is corroborated by the words which immediately follow "standing apart from other mills."

Rule absolute to enter judgment for the plaintiff.

END OF EASTER TERM.

REPORTS OF CASES

ARGUED AND DETERMINED IN THE

COURTS OF EXCHEQUER OF PLEAS

AND

EXCHEQUER CHAMBER,

IN

Trinity Term,

IN THE FIFTH YEAR OF THE REIGN OF WILLIAM IV.

1835.

FALLOWS *against* BIRD.

Assumpsit on a bill of exchange for 65*l.*, with an indebitatus count, concluding to the plaintiff's damages of 200*l.* Pleas: as to 35*l.*, parcel of the money in the bill, that defendant accepted the bill, so far as respected that sum, for the plaintiff's accommodation, on terms stated in the plea. As to the sum of 40*l.*, other parcel of the sums in the declaration mentioned, the defendant pleaded payment of that sum into court, and that plaintiff had not sustained damages to a greater extent than the said sum of 40*l.* in respect of the cause of action in the said declaration mentioned *as to that sum*. Verification. And as to the residue of the said sums and premises in the last count, non assumpsit. The replication took issue on the first plea, denying the bill to be an accommodation bill, and also on the last plea, without noticing the second. The jury found a verdict for the plaintiff for 30*l.*, and it was held, that as the material question for the jury was, whether any thing remained due to the plaintiff from the defendant, the judgment could not be arrested on the ground of any discontinuance on the record, by not answering the second plea; and that though a nolle prosequi should regularly have been entered before the trial, that might be done before entering up final judgment.

ASSUMPSIT by the drawer against the acceptor of a bill of exchange for 65*l.* Counts in indebitatus assumpsit for 100*l.*, for work and labour as an agent generally; for 100*l.* for work and labour as a surveyor; 100*l.* for interest, and 100*l.* on an account

ed, to the plaintiff's damage of 200*l.* Pleas: first, :o 35*l.* parcel of the sum of money in the bill of hange in the first count mentioned, that the de- lant accepted the bill of exchange so far as re- cted the sum of 35*l.*, for the accommodation of the ntiff, upon the terms, that if the defendant should the said sum of 35*l.*, the same should be returned ıim, and that he should not be liable or called upon ıay the said sum to the plaintiff; and the defendant :her said, that the plaintiff always held and still ds the said bill upon the aforesaid terms. Verifi- ion. Secondly, as to 40*l.*, other parcel of the sums the declaration, payment of that sum into court, ı the usual averment, that the plaintiff hath not tained damages to a greater extent than the said ı of 40*l.*, in respect of the cause of action in the l declaration mentioned, *as to that sum.* Verifica- ı. Thirdly, as to the residue of the said sums and mises in the last count, non assumpsit.

Replication to the first plea, that the defendant did accept the said bill of exchange, so far as respects said sum of 35*l.*, for the accommodation of the intiff, and upon the terms, that if the defendant uld pay the said sum of 35*l.*, the same should be ırned to him, and that he should not be liable or ed on to pay it. Issue thereon.

ıimiliter to the last plea. No replication to the plea payment of money into court. The plaintiff had a dict for 30*l.* at the *Warwick* assizes. *Gale* having ained a rule nisi for arresting the judgment, on the ınd that the neglect to notice the second plea had asioned a discontinuance on the record,

Goulburn Serjt. showed cause. This rule must be dis- arged on two grounds, first, that the error of not reply- g or entering a nolle prosequi before the trial, was cured

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by the verdict for the plaintiff, on the plea as to the residue; and next, that a nolle prosequi may be entered at any time before final judgment. As to the first point, the payment of money into court, alleged in the second plea, is not traversed. Nor was a replication required, unless further damages had been sustained. But if that is otherwise, the last plea, which in substance alleges that no further sum was due or damages sustained, was put in issue and found for the plaintiff. The residue due to the plaintiff was the matter in dispute at the trial. Then the jury must have considered what sum remained due. At all events, the plaintiff, before final judgment, is in time to enter a nolle prosequi, and satisfaction as to the 40*l.* mentioned in the second plea; *Fleming* v. *Langton* (*a*), *Duperoy* v. *Johnson* (*b*).

Gale in support of the rule. Cases in which discontinuance has been cured by verdict, were cases of several pleas, where each was pleaded by leave of the court to the whole declaration. There are three separate pleas on this record, each affects to answer a part, and each has a separate commencement and conclusion. [Lord *Abinger* C. B. All, together, form but one defence to the action. How can the plaintiff traverse the payment of money into court? He might have taken it out had there been a prayer of judgment, as prescribed by the new rules. *Alderson* B. There should have been no third plea, for the second plea of payment should have been pleaded to the residue (*c*). Is it possible that there could be larger damages on the plea of payment than the 40*l.* actually paid into court, when no further damages are

(*a*) Stra. 532. (*b*) 7 T. R. 473.

(*c*) See *Sharman* v. *Stevenson*, *ante*, 565.

ged to be sustained *as to that sum.* Lord *Abinger* B. The plea of payment of money into court is ormal, for it is not pleaded generally, in compliance h the new rules, nor has it concluded with a prayer judgment as to the further maintenance of the ion. That produced the perplexity, and induced plaintiff to treat the second plea as if it had occrred before the new rules.] The second plea has t been answered or tried at all. Had the plaintiff tered a nolle prosequi as to the 40*l.*, that would ve settled all questions as to so much; whereas here is verdict for 30*l.* may be for part of the very 40*l.* id into court, the jury being shut out from seeing at fact on the second plea.

Lord ABINGER C. B.—The answer to the last obrvation is obvious, because the jury must have oked at the whole record, so as to have seen that the ue on the last plea was as to the residue owing from e defendant to the plaintiff. The situation of the ry was the same as if the plaintiff had before trial tered a nolle prosequi, or a suggestion that he had ken the 40*l.* out of court, which would have been the gular course. The plaintiff might treat the second d third pleas as one plea, though informally pleaded, he could not treat them otherwise than by joining the only issue which was tendered, whether a resie remained due to him from the defendant. The bstantial issue then was, whether further damages re sustained by the plaintiff above the 40*l.* paid into urt. The entry of a nolle prosequi is a mere matter form, which is not necessary before entering up nal judgment. The plaintiff may enter it now, and make the record correct. Still the real issues would emain, *viz.* whether as to 35*l.*, parcel of the sum in e bill, that bill was an accommodation bill or not; and

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FALLOWS v. BIRD.

as to the residue claimed, whether any thing was due to the plaintiff. The last question went to the jury, and the plaintiff had a verdict for 30*l.* Had the defendant adhered to the form of plea prescribed by No. 17 of the new rules *Hil.* 4 *W.* 4., and pleaded first to the bill, and then payment of money into court as to the residue of the claim, the plaintiff might have replied that he had sustained damages *ultra*, and then have concluded to the country. Whereas in this case he was prevented from so doing by the form of plea.

The other barons concurred.

Rule discharged.

SYMONS *against* BLAKE.

After a plaintiff had obtained a verdict for damages in an action for words, imputing bullock stealing to him, he was convicted and attainted of that same offence so imputed. The court refused to stay the proceedings or grant a new trial on that account, particularly as the defendant was prosecutor, and a witness on the criminal trial.

Unless a party appears to the court to be clearly entitled to an audita querela, they will not grant him on motion the remedy to which he declares himself entitled by that writ.

A defendant will be relieved from a verdict against him, if proper cause for so doing exists as between him and the plaintiff, though the plaintiff's attorney may thereby lose his lien on the judgment for his costs.

CASE for slanderous words, imputing to the plaintiff, that he had feloniously stolen certain bullocks belonging to the defendant. The only plea was, not guilty. At the trial before *Patteson* J. at the last *Cornwall* assizes, the plaintiff obtained a verdict for 60*s.* damages. In last term *Erle* moved to stay the proceedings, relying on affidavits, stating that after the trial of this cause the plaintiff was indicted, on the prosecution of the defendant, at the *Cornwall* quarter sessions, for stealing from him certain bullocks, and that the defendant was examined on that trial to prove the loss of the bullocks. That other witnesses de-

posed to the more material facts, and that the defendant was found guilty, and sentenced to be transported for life. It was urged, that upon these facts the court was called on to interfere in the manner prayed, by exercising its summary power on motion, instead of driving the defendant to sue out the writ of auditâ querelâ, to which he would be otherwise entitled, as the defence had arisen after pleading in bar; *Wicket* v. *Cremer* (*a*). The court, observing that the plaintiff was not shown to have been attainted of the particular felony imputed, granted a rule nisi to stay the proceedings, desiring it to be served on the attorney-general; but it appearing on affidavit that the crown did not interfere in consequence, cause was shown on behalf of the plaintiff's attorney by

Bompas Serjt. and *Manning*. This rule must be discharged, unless it appears to the court, first, that an auditâ querelâ would lie, and next, that the defendant would be successful in it if brought; *Lister* v. *Mundell* (*b*). Now the plaintiff's attainder could not be set up by this defendant in an auditâ querelâ, so as to ensure him success in that form of action, because the plaintiff's conviction had been partially procured by the defendant's own testimony; *Bartlett* v. *Pickersgill* (*c*), *Rex* v. *Boston* (*d*), *Gibson* v. *M'Carty* (*e*). The guilt and conviction of the party must be stated in the declaration, and if denied by the plea must be proved. [*Alderson* B. The record of the conviction would only be put in to prove, not the guilt of the plaintiff, but the fact of its having taken place.] Still the defendant would reap the advantage of his own testimony,

(*a*) 1 Ld. Raym. 439; *S. C.* 1 Salk. 264; 12 Mod. 240.
(*b*) 1 B. & P. 427. And see cases collected 2 Wms. Saund. 148 a.
(*c*) Reported from Mr. Justice *Aston*'s notes, in 4 East, 577 n.
(*d*) 4 East, 572. (*e*) Cas. temp. Hardw. 311.

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SYMONS v. BLAKE.

for it was as material to the conviction to prove his property in the stolen bullocks, as to prove the felonious taking. Were this otherwise, the prosecutor in many cases, for instance, in horse stealing, would have a strong interest to commit perjury, in order to succeed afterwards in trover for the horse. [*Alderson* B. When the case of *Blakemore and Booker* v. *Glamorganshire Canal Company* (*a*) was before us, we considered a great variety of dicta on this subject, and were of opinion that the true reason why a judgment in a criminal case is inadmissible in a civil proceeding by the same person who was the prosecutor, is, that it is res inter alios acta. I have considered this point much. The judgment and conviction may be used to show the fact of the party's conviction, but not to prove him to have been guilty of the offence imputed.]

Next, the plaintiff's attainder did not divest his mere inchoate right to unliquidated damages, which being a chose in action, not in the nature of a debt, but of a tort only, could not vest in the crown, for it must have passed in rem judicatam before it could constitute such a debt to the convict as would vest in the crown by attainder; *Bullock* v. *Dodds* (*b*). No case was there cited to show the right of the crown to damages recovered for a personal tort to the felon: and it is expressly stated, that the right to damages is not forfeited by outlawry for felony, which is the same as attainder for felony, quoad the rights of the parties.

Lastly, it is too late to object to the personal disability of the plaintiff by reason of his attainder of felony; for that, like outlawry for felony, can only be pleaded in abatement, where the action is brought for a tort to the felon, and not for a debt due to him, the right to which vested in the crown. Then being

(*a*) *Ante*, 610. (*b*) 2 Bar. & Ald. 258.

ıtter in abatement only, it would not support an ıditâ querelâ. So many grave doubts on the law ' forfeiture would arise in that proceeding if insti- ted, that the court would not dispose of them sum- arily on motion, *Gibson* v. *M'Carty* (*a*); *Gilbert's ommon Pleas*, 205; 2 *Roll. Abr.* 195; *Batty* v. *Fay* (*b*), ere also mentioned.

Erle and *W. C. Rowe* contrà. It is not disputed at this court will grant relief on motion, if the party n show himself entitled to it on auditâ querelâ. In at proceeding the pleadings would set out the record ' the conviction, which could only be met by plea of nil el record; so that when the conviction was produced,) question could arise as to the evidence on which it as obtained. In the cases where the witness on whose ridence a conviction for perjury in answers in a suit in quity had been obtained, sought to use the conviction ı a civil case in order to prove the falsehood of those articular answers on which the perjury was assigned, ıe evidence was properly rejected, but the record f the conviction would only be necessary here to rove that the conviction of *Symons* had taken place. ıs to the second point, no authority is cited to show ıat there is any distinction between a felon's right to nliquidated damages, and to debts or choses in action, n account of which the latter vest in the crown. *Iawkins*, in his *Pleas of the Crown* (*c*), lays down, hat "all things whatsoever which are comprehended inder the notion of a personal estate, whether they be n action or possession, which the party hath or is enti- led to *in his own right*, and not as executor or ad- ninistrator to another, are liable to forfeiture." Whe-

(*a*) Annaly's Rep. temp. Hardw. 311.
(*b*) Ridgway's Irish Term Reports, 511.
(*c*) 2 Hawk. P. C. c. 49. ss. 9. 18. See also Bac. Abr. Forfeiture B.

forfeits the fruits of that judgment to th
suit by a party who afterwards become
enures for the benefit of the crown. A
be pleaded in bar as well as abatement, *Ba*
(C.) [*Alderson* B. That is so where the
of action for a debt is forfeited to the crow
this case.]

Cur.

The judgment of the court was afterwa
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Bolland B.—This was an applicatio
the proceedings in this cause. The action
the last *Cornwall* assizes before my broth
The declaration complained of the defe
spoken words of the plaintiff, imputing
commission of a felony. The defendant
general issue only, and on the trial the pl
verdict with 60*s.* damages.

Subsequently to this trial the plaintiff h
and attainted upon a charge made again
defendant, and at that trial the defend
mined as one of the witnesses for the
Upon these facts, disclosed by the a
defendant applied for and obtained the

whether the attorney for the plaintiff, on behalf of whom cause has been shown, is to be deprived of his chance of obtaining the fruits of the verdict by the present rule being made absolute. We think that he is in no better situation than his client would be, for the lien of the attorney depends on the right of the client to judgment (a). Where the client is entitled to it as against the opposite party, the court permits the attorney to carry on the suit for his own benefit, even where the client declines to do so himself: but where there is no collusion, and the client, either by his own act, or by the act of the law, is deprived of the means of further enforcing his claim against the opposite party, the lien of the attorney is altogether at an end. If, therefore, we were clearly satisfied that the plaintiff in this case was in that situation, it would be proper to grant the present application.

Now it is said that he is so, because the defendant has a right to sue out a writ of audita querela, and to deprive the attorney, by so doing, of the power of taking out execution under the judgment when signed. And there is no doubt that the courts have laid it down, that where a defendant is entitled to such redress by writ of audita querela, they will give relief by motion in order to prevent the necessity for such a writ. But it is also laid down that such cases must be clear: for the court, by granting such summary relief, precludes the party from the chances of the failure of proof, when the facts are properly investigated, and from the benefit of the judgment of a court of error, on any question of law arising therefrom. It is upon this ground, therefore, that we think the court ought not to grant this application. In the first place, it may be very questionable how far, in the absence of any

(a) See *George* v. *Elston*, 1 Bing. New Cases, 513.

at the premises in the declaration mentioned were ot, nor was any part thereof, the premises of the plainff, as in the declaration mentioned; concluding to the untry. Thirdly, that the defendant committed the leged trespasses on and prior to 1st *March* 1834, by e leave and licence of the plaintiff. Fourthly, as to e trespasses since 1st *March* 1834, the defendant rought into court the sum of 55*l.* to be paid to the laintiff, and denied that he had sustained damages in spect of those trespasses to a greater amount. Issues ere taken on all these pleas. At the trial before *olland* B. at the last assizes for *Carnarvonshire*, the aintiff put in and proved the judgment in ejectment ainst the defendant and the writ of possession. The eclaration in ejectment was of *Easter* term 1834, conining five counts, the three first on the respective emises of *W. Roberts, Lawry Roberts*, and *H. W.*, shop of *Bangor*, all dated 18th *June* 1831; the fourth d last on the demise of *W. Roberts*, dated respecely 20th *March* and 1st *May* 1834. *W. Roberts*, e actual plaintiff, obtained possession on 17th *May* 34, but after judgment by default against the casual ector, a writ of possession issued, and was executed 28th *January* 1835. The value of the property ving been shown, the judgment in ejectment and rit of possession were proved, and the bill of costs in e ejectment was put in, amounting to 99*l.*, which veral attornies swore to be reasonable between atrney and client. Two general retainers to counsel, d the expense of a journey to *Dolgelly* in search of e were charged, though the attorney had acted as unsel at the quarter sessions there. For the defendnt, it was then proposed, under the second plea, to ove title in the defendant by purchase from the asignee of *Lawry Roberts* of her life interest in the emises, and that she died on 1st *March* 1834: con-

1831, while the money paid into court
them after that time, and also the cost
ment as between party and party, whi
would only be 22*l.* The learned bar
the judgment in ejectment and writ
were conclusive evidence of the plaintiff
earliest day of demise laid in the de
rejected the proof of title in the defend
directed the jury, that their verdict ne
fined to the smaller amount of costs whi
ant's witnesses had stated, and that t
ceeding in ejectment had a right to r
necessary charges of asserting his right.
the retainers and journey to be, in his o
which ought not to be allowed. Verd
for 360*l.* damages for mesne profits fr
1831 to 17th *May* 1834, and for 45*l.* for
Easter term a rule nisi for a new trial w
the point taken below; *Vooght* v. *Win*
v. *Morewood* (*b*), *Stafford* v. *Clark* (*c*),
Richardson (*d*), were cited. The rule wa
on another point, that the plaintiff coul
costs as between party and party; *Doe* v

J. Jervis and *Welsby* showed cause.
offered to impugn the plaintiff's title

stands as if it had arisen on the general issue before the new rules of pleading. The second plea is only a portion of the old general issue, and necessarily concludes to the country. It therefore precluded the plaintiff from replying, by way of estoppel, title in himself by judgment in ejectment. The only part of the pleadings in which the estoppel could have been averred was the declaration; but to pray an estoppel in a declaration by way of anticipating a possible plea of title in the defendant, would not only be wholly unprecedented, but repugnant to the very nature of the subject-matter of the plea; for estoppel is always found to be pleaded in bar to some previous matter, which it is desirable to shut out the adversary from using. Putting aside this difficulty of pleading, the judge's direction at the trial is supported by *Aslin* v. *Parkin* (a), which was decided by Lord *Mansfield* and the Court of King's Bench, after conference with the other judges. The question there was, whether, after judgment by default in ejectment, the action for mesne profits could be brought in the name of the lessee or nominal plaintiff in ejectment; and it was held that it might, as the lessor of the plaintiff and the tenant in possession are substantially the only parties to that suit, and the action for mesne profits might be brought by the lessor of the plaintiff in his own name or the name of the nominal lessee, being in either shape equally his action. An argument had been advanced, that though the defendant would confessedly have been bound by the judgment had he entered into the consent rule, he was not concluded by a judgment against the casual ejector, to which he was no party; which Lord *Mansfield* thus answered: "An action for the mesne profits is consequential to the recovery in ejectment (b). The tenant is concluded by the judg-

(a) 2 Burr. R. 665. (b) See *Pulteney* v. *Warren*, 6 Ves. 84.

been treated by the best text writer
merely dependent on and part of the m
ejectment; by which, under the sanctio
title to land is tried in the names of fi
This is a mere action to recover the
accrued during that possession of the
judgment in ejectment has determined
place without title to it, and to try such
in such an action, would put an end
resulting from the present system of
ejectment. In general a former judgme
point between the same parties, must
way of estoppel, or will not be conclusiv
applies in cases where the second action
a new one. Now an action for mesne p
consequential and ancillary to the prev
and completes the remedy to which that
was inadequate. [*Alderson* B. If th
pleadings be such as leaves the questi
they cannot be estopped from finding t
the second plea was pleaded, it could b
the plaintiff that he should be called
title.] All contested in this action is
session from one given day to anothe
Winch and *Outram* v. *Morewood* we

ecclesiastical courts. Judgments in rem are not necessarily between the same parties. The other instances conclude not the parties only but all persons. They go equally to the jury who try the truth. Besides, a judgment in scire facias is between the same parties, and is conclusive though not pleaded. If the judgment extends to bind more persons than the parties, the more apparent is the reason for compelling it to be pleaded. As to the costs, *Doe* v. *Davis* (*a*), cited and recognised in *Brook* v. *Bridges* (*b*), shows, that after judgment by default in the ejectment, the plaintiff might go into evidence in this action, and recover the *actual* costs of the judgment, not being bound by his taxation, as he would be had he recovered after a defence (*c*).

R. V. Richards supported the rule. A judgment in ejectment is no more conclusive evidence, on the plea of the general issue in a subsequent action for the mesne profits, than a judgment in a common action of trespass would be. The only difference is, that in an action of trespass for mesne profits, the nominal plaintiff in ejectment is allowed to be the plaintiff. Now *Lloyd* v. *Peel* (*d*) shows, that trespass for mesne profits is a substantive action, separate from the previous ejectment; for it was held to lie, notwithstanding a plea in bar that the defendant had been discharged under an insolvent debtors' act. A careful perusal of *Aslon* v. *Parkin* throughout, shows that the only point for the decision of the court was, whether, in the absence of a consent rule entered into by the defendant, the nominal lessor in ejectment might bring the action for mesne profits. Nor is it any where stated in

(*a*) 1 Esp. 358. (*b*) 7 B. Moore, 471.
(*c*) See 4 Taunt. 7; 1 Stark. C. N. P. 306; 1 Bos. & P. 205.
(*d*) 3 B. & Ald. 407.

dence of the plaintiff's right and title to
from the day of the demise laid in the c
ejectment, it is no proof of the defendant
at that time. Here it was sought to sl
Lawry Roberts's death she had possessic
the premises, and the defendant had a titl
session of the rest; and the defendant h
show that his wrongful holding commence
the title was shown out of *Roberts*. *B*
another v. *Glamorganshire Canal Compa*
point. It will be confessed, that to recc
for profits received at any time before the
demise laid in the declaration, the judgm
ment is not conclusive evidence of the pl
That does not differ in principle from thi
jury might at any rate find the truth
manner the parties might be estopped.
supporting his rule as to the costs.]

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The judgment of the court was afterwa
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Bolland B.—*Doe* v. *Huddart* was
trespass for mesne profits, tried before m
assizes for the county of *Carnarvon*. Th
was in the ordinary form. The defendan

: trespasses, he paid 55*l.* into court, and denied
s *ultra* that sum. At the trial, the judgment
ment, which had been suffered by default, was
ed in evidence. The record contained in effect
nises, one in 1834, and one at an earlier period;
esne profits accruing subsequent to the demise
t, were fully covered by the money paid into
At the trial, it was proposed to show by evi-
hat the title of the lessor of the plaintiff did not
before the time of the demise in 1834. I
to admit this evidence, on the ground that the
nt in ejectment was conclusive against the de-
. A rule nisi was obtained for a new trial, and
ause being shown, the court took time to con-
f its judgment. On full consideration, we are
opinion that the evidence was receivable, and
e rule ought to be made absolute. The general
law since the case of *Vooght* v. *Winch*, must, we
be taken to be clearly established; and that is,
judgment between the same parties is not con-
unless pleaded as an estoppel. There are two
as Mr. Justice *Holroyd* there observes, which
may adopt; he may say the other party is not
ty to call upon me to answer for what has been
sly decided; or he may say that his opponent
such ground of action as he has alleged. In
ter case he refers the question to the jury, who
determine, not whether it has been previously so
d, but whether the right be as alleged between
adings of the parties. And in *Goddard*'s case (*a*),
id down, that although in pleading the obligee
allege delivery before the date, because he is
ed from taking an averment against any thing
sed in the deed, yet the jurors, who are sworn to
e truth, shall not be estopped. Now if this be
neral proposition of law, it is difficult to under-

(*a*) 2 Rep. 4 b.

these actions, would, as far as possib
course in other actions, and not unnec
an anomaly to the general rules of evider
If the jury are sworn to try the issue in
is the effect of their oaths to be differen
an action of this description from its effec
We can see no reason for such a concl
sequently we think that the cases of *V*
and *Outram* v. *Morewood* are not dis
principle from the present case. Then
undoubtedly there are to be found di
judges, and particularly of Lord *Mansfi*
Parkin, which have been transferred t
upon evidence, as establishing that a jud
ment is conclusive as to the right of po
time laid in the declaration, a position
Mr. *Phillipps* in his Law of Evidenc
324 (*a*), and upon which I acted at the
court think that these authorities are no
much weight, because they may be ex
supposition that the point was not s
sented to the court; and the circumst
cases were such as would make it imma
learned judges to distinguish between
cogent and what is conclusive evidenc
and more especially between cases wh

Bird v. *Randall* (a) is adverted to, and overruled by Lord *Tenterden* in his judgment of *Vooght* v. *Winch*, although it is due to Lord *Mansfield* to say, that the report in *Burrow* does not seem to justify the argument founded on it in later cases. Upon the whole, therefore, we think that in this case the record of the judgment in ejectment, although of some weight, was not conclusive evidence in the cause, and that consequently the defendant should not have been precluded in this state of the pleadings from giving the evidence he proposed to give. For these reasons, we are of opinion that the rule for a new trial must be made absolute.

Rule absolute.

(a) 3 Burr. 1353.

HUZZY *against* FIELD.

A public ferry is a public highway of a special description, and its termini must be in places where the public have rights, as towns or vills, or highways leading to towns or vills. It would therefore be actionable to construct a new landing place at a short distance from one terminus of an ancient ferry, and to make a practice of ferrying passengers from the other terminus and landing them at the new place, from whence they pass to the same town or vill in which the ancient ferry is, or to the same public highway in which it is so established before it reaches any town or vill, and by which highway they go immediately to the first vill or town, and to all the other vills and towns to which it leads. But where there is a river or body of water passing by several towns or places, the existence of a franchise of an ancient ferry over it from point A. on one side to point B. on the other, does not preclude the king's subjects from using the water as a public highway from or to all the other towns or places on its banks, or oblige them on all occasions to pass from one terminus of the ferry to the other.

A person who kept a boat to ply for hire and ferry persons across *Milford Haven*, employed a servant to row the boat. This servant was proved to have taken a passenger on board in the usual manner, and to have carried him at his request from one terminus of an ancient ferry to a place within half a mile of the other terminus: Held, that as the servant acted at the time in his ordinary course of employ by his master, the master would be answerable for his act, had it amounted to an infringement of the ancient ferry.

CASE for infringement of ferry. The first count stated that the plaintiff was possessed of a certain ancient ferry called *Burton Ferry*, otherwise *Pembroke Ferry*, across and over a certain branch of a certain haven called *Milford Haven*, for the conveying and

two miles from the *Pembroke Ferry-house*, and from a place called *Pater Dock*, both on the south shore of *Milford Haven*, and at a rather less distance from another spot on the same south shore called *Hobb's Point*. An old road led from *Pembroke Ferry-house* to *Pembroke* town. The plaintiff was tenant to Sir *John Owen* of a ferry for horses and foot passengers called *Pembroke Ferry*, straight across *Milford Haven*, from *Pembroke Ferry-house* on the south, to *Barnlake* point, in the parish of *Burton*, on the north side of the haven, and on the way from *Pembroke* to *Haverfordwest*; and of another ferry called *Nayland Ferry*, from *Nayland* on the northern shore to *Pembroke Ferry-house* on the southern. About 1813, a large dock-yard was formed by the crown on a spot called *Pater*, adjoining *Milford Haven*, situate a mile to the west of the *Pembroke Ferry-house*, and nearer the sea. A great population having sprung up near the dock-yard, a new road was made from the town of *Pembroke* to *Pater Dock*, which passed near *Hobb's* point, and to the south of it. *Hobb's* point was situate about half a mile nearer the sea than the *Pembroke Ferry-house*, at a spot between the ferry-house and *Pater Dock*. Within about two years a road had been made to *Hobb's* point by the Board of Ordnance, and a pier erected there for the convenience of the post-office packets to *Ireland*. Since the making the new road from *Pembroke* town to *Pater Dock*, it had become nearer to go from *Nayland* to *Pembroke* town, by crossing the haven to *Hobb's* point, than to the *Pembroke Ferry-house*. The main point in the cause arose on the fact that the defendant often carried passengers in his boat from *Nayland* to *Pater Dock*, and that on one occasion when the defendant's servant-boy was plying at *Nayland*, one *Llewellyn* got into the boat, and after the boy had pushed off shore, asked to be taken to *Hobb's*

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HUZZY v. FIELD.

point, saying he was going to *Pembroke* (*a*), and the boy rowed him accordingly to *Hobb*'s point and got ashore at the pier. The plaintiff contended that this was in point of law an infringement of his ferry from *Nayland* to the *Pembroke Ferry-house*, and that he was therefore entitled to a verdict. For the defendant it was answered, that nothing proved this to have been done in fraud of the plaintiff's ferry, and that at most it was an act of the defendant's servant, done without any authority from the defendant, express or implied, and for which he could not be liable. The jury negatived any fraudulent act by the defendant to infringe the plaintiff's right to *Pembroke Ferry*. The learned baron directed a verdict for the defendant, giving leave to the plaintiff to move to enter a verdict for nominal damages, if the court should be of opinion that the act proved to have been done by the defendant's boy amounted to an infringement of the plaintiff's right of ferry. In *Michaelmas* term last the court granted a rule on this point, but refused to disturb the verdict by granting a rule for a new trial; Lord *Lyndhurst* C. B. saying, that the want of evidence that the plaintiff had kept any boat to ferry passengers from *Nayland* to *Pater* or *Hobb*'s point, was the strongest evidence against his claim of a ferry between those places.

J. Evans and *J. Wilson* showed cause in *Hilary* term (*b*). First, the defendant was not responsible for the act of his boy in putting *Llewellyn* ashore at *Hobb*'s point on his way to *Pembroke* town; for the general authority given him by the defendant was only to convey passengers to *Pater Dock*. But the act itself

(*a*) The other point raised for the plaintiff was, that his right of ferry extended from *Nayland*, on the north side the haven, to *Pater Dock*, as well as to the ferry-house on the south; but the jury found the contrary.

(*b*) *Whitcombe*, who was with them at the trial, died before the argument.

not having been done with intent to defraud the plaintiff, cannot amount to an infringement of his ferry. Whether, since a new road has been made to *Hobb's* point, it is nearer to go from *Nayland* to *Pembroke* town by that way than by *Pembroke Ferry*, cannot be the test of the defendant's liability to this action; for, supposing that by means of a new communication, *Pembroke* town should become so situated with respect to *Pater Dock*, that it should become nearer to go from *Nayland* to *Pembroke* town by *Pater Dock*, than by *Pembroke Ferry*, could it be contended, that carrying passengers from *Nayland* to *Pater Dock* was an infringement of the plaintiff's ferry from *Nayland* to *Pembroke Ferry?* The jury having negatived any intent to defraud the plaintiff's ferry, *Tripp* v. *Frank* (*a*) applies. There the plaintiff, as lessee of the corporation of *Hull*, was possessed of a certain ferry over the *Humber* called *South Ferry*, and proved a presumptive right in his lessors to a ferry between *Hull* in *Yorkshire* and *Barton* in *Lincolnshire*. The defendant was owner of a market-boat at *Barrow*, and had carried persons from *Hull* to that place, which is in *Lincolnshire*, two miles lower down the *Humber* than *Barton*. There was a daily ferry between *Hull* and *Barton*, but to no other part of *Lincolnshire*. The plaintiff admitted that the defendant was not liable to provide boats to any part of *Lincolnshire* except *Barton*, and Lord *Kenyon* said, "if certain persons wishing to go to *Barton* had applied to the defendant, and he had carried them at a little distance above or below the ferry, it would have been a fraud on the plaintiff's right, and would be the ground of an action. But here these persons were substantially and not colourably merely carried over to a different place, and it is absurd to say that no person

(*a*) 4 T. R. 666.

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shall be permitted to go to any other place on the *Humber* than that to which the plaintiff chooses to carry them." He added, "It is now admitted that the ferryman cannot be compelled to carry passengers to any other place than *Barton*; then his right must be commensurate with his duty." So that in this case, as the plaintiff might refuse to ferry a passenger from *Nayland* to *Hobb*'s point, he can have no right to the exclusive ferrying of passengers between those points.

Sir *John Campbell* (Attorney-General), Sir *William Owen*, *Chilton* and *E. V. Williams* supported the rule. First, the act of the defendant's servant in rowing the passenger from *Nayland* to *Hobb*'s point, in order knowingly to forward him to *Pembroke*, was within the scope of his authority from his master. For as the defendant kept the boat and received the earnings of his servant who rowed it, the servant's act was not done wilfully and against his master's directions, but for his master's benefit, and in the course of his ordinary employment. Then, whether he had an express command from the defendant to do the particular act, is immaterial, and the defendant is liable for it; *Turberville* v. *Stampe* (a), *Bush* v. *Steinman* (b), *Rex* v. *Almon* (c). Secondly, as the plaintiff was bound to keep a boat to ferry over all persons going from *Nayland* to *Pembroke* town, his right of ferry is correlative with his duty. Then the act of taking *Llewellyn* to *Hobb*'s point, to enable him to get by that way to *Pembroke* town, instead of by the *Pembroke Ferry-house*, was an infringement of the plaintiff's right to *Pembroke*

(a) Lord Raym. 264; see as to this case, *ante*, Vol. I. 51, note (a).

(b) 1 Bos. & P. 404.

(c) 5 Burr. 2686; see also *Attorney-General* v. *Siddon*, *ante*, Vol. I. 41; *Attorney-General* v. *Riddell*, *ante*, Vol. II. 523; *Mackenzie* v. *Macleod*, 10 Bing. 385; *Garth* v. *Howard*, 8 Bing. 451.

rry. Now a ferry is not a line between points A. 1 B. consisting of length without breadth, according mathematical definition; for if it were so, and had some considerable extent on either side, it would amount to any privilege at all. But *Tripp* v. *ank* shows, that a person who carries passengers r a river &c., at a short distance from an ancient ry, infringes the right of the owner of that ferry. en the line from *Nayland* to *Hobb*'s point may be sidered contained in the plaintiff's ferry from *Nay-d* to *Pembroke* town. [Lord *Abinger* C. B. That ment would only apply if going from *Nayland* to *mbroke Ferry-house* meant going to *Pembroke* town. *rke* B. This would be an invasion of the plaintiff's bt to the ferry from *Nayland* to *Pembroke Ferry-se*, if the plaintiff was obliged, and had therefore ight to carry all persons going from *Nayland* to *mbroke* town.] The passenger in question was ng to *Pembroke* town, the place to which the plain-'s ferry from *Nayland* to the ferry-house leads. en this is a stronger case than *Tripp* v. *Frank*, ere the passengers were not going to *Barton*, the minus of the plaintiff's ferry; and it is admitted, it if, instead of a single ferry-house, there had been a rn about that spot where it stands, the landing people, her higher up or lower down the shore, in order to to the town, would have been an infringement of ferry. But the bare act of setting up a ferry-boat close to an ancient ferry as to injure (*empaire*) it, is ionable by the owner of the ancient ferry in respect his being bound to sustain and repair it for the use the king's subjects, on pain of being grievously erced. The passage in *Rolle*'s Abridgment, tit. *usans* (G), pl. 4. to the above effect, is repeated in *ner*, and in *Comyns*'s Digest, tits. *Action on the Case a Nuisance* (A), and *Pischary* (B), and is relied on by

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Blackstone in 3 Com. 219. The original authority is in the Year-Book 22 *H.* 6. 14 B. (*a*), in *The Prior of St. Nedeport* v. *Weston*. The plaintiff counted in trespass, that he as lord of *St. Nede* had in that ville from time immemorial three freehold mills, at which all tenants of the prior, and all other persons resident within the vill, were used and accustomed and ought to grind their corn; but that the defendant, one of the said tenants, had erected a mill within the said vill, at which the residents therein ground their corn, to the plaintiff's damage. After argument, *Paston* J., after premising that peradventure it might be said that the owner of an ancient mill, to which persons had resorted *de bon gré* to grind their corn, could not sue a party who erected a new mill on another branch of the same stream, so as to injure the profit of the old mill (*b*), proceeds thus: "Donque jeo pense en ce cas si j'ay un market, ou un faire, le Samadie, et un autre leve un market, ou un faire, mesme le jour, en une ville qui est prochein a mon market, issint que mon market ou mon faire est *empeire*, jeo aurai envers luy assise de nusance, ou action sur mon cas. Et mesme le ley est, si j'ay de ancien temps une fery en une ville, et un autre leve une autre fery sur mesme le rive prochein a ma ferie, issint que le profit de ma ferie est *empeir'*, jeo aurai vers luy action sur mon cas: issint paraventure ici." *Newton* J. added, "Vostre cas de fery divers del cas al barre: car en vostre cas vos estes tenus de susteiner le fery, et de ce servir, et reparer, al ease de comon people; et auxi vos seres grevous amercys, et ce enquirable avant le vicomte en ses tournes, et auxi avant Justice en Eire; mes en ce cas al barr, si le seigneur de les molins eux suffre d'al' a wreke, ou il molins eux distrue, il est dis-

(*a*) See Brook's Abr. tit. Action on the Case, pl. 57, and Fitzherbert's Abr. same title, pl. 11.

(*b*) See 3 Bla. Com. 219.

nishable. Et en votre cas de market ou faire, ceo poit estre: car en le grant de le roy, est tiel clause, nvou tonfois que ne soit a nusance a's ascuns autres res ou markets; issint que cel leve en lui mesme est nusance." *Churckman* v. *Tunstall* (a) appears to pugn the position in *Rolle*, but the reporter adds a ure. [*Parke* B. That is the case of *Kew Ferry*, d is no authority against you. I made searches, and nd that Lord *Hale* afterwards decreed that the new ry, which had been set up three quarters of a mile m the old one, should be put down.] *Blissett* v. *rt* (b) shows, that the owner of an ancient ferry may e another person who sets up a new one near it, e reason being, that as the owner of the ancient ferry is compellable to keep up a boat there. [*Parke* B. *ipp* v. *Frank* certainly seems at variance with the ler cases.] That seems a hasty decision, and the r authorities existing on the subject were not cited. e case of a ferry is analogous to that of a market, d is so treated by *Comyns* in his Digest, ubi suprà. w holding a new market within seven miles of a n's ancient market, and on the same day, will be nded in law to be a nuisance to the latter; but if new one is held within that distance on a different y, the jury must find whether it prejudices the old or not; *Yard* v. *Ford* (c). Seven miles is contred a reasonable distance between one market and ther, and if that principle is applied to ferries, it t be actionable to set up a new ferry where an old is kept up within a reasonable distance. Here the intiff's ferry from *Nayland* to the *Pembroke Ferry*-se, was equally available to a passenger going to *mbroke* town as the passage to *Hobb*'s point, and the

(a) Hardres, 162. (b) Willes, R. 508; *S. C.* Bull. N. P. 76.
(c) 2 Saund. 172; *S. C.* 1 Levinz. 296; Sir T. Raym. 196; and see (2) to 2 Saund. 175.

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plaintiff is obliged to keep up boats there; then that burden should be compensated by having a remedy against a person erecting a new ferry so near as to take off the passengers from *Nayland* to the ferry-house. *Blackstone*, in his Commentaries (*a*) says, "If a ferry is erected on a river, so near another ancient ferry as to draw away its custom, it is a nuisance to the owner of the old one. For where there is a ferry by prescription, the owner is bound to keep it always in repair and readiness for the ease of all the king's subjects; otherwise he may be grievously amerced. It would therefore be extremely hard if a new ferry were suffered to share his profits which does not also share his burthen." [Lord *Abinger* C. B. This case involves a very considerable question, viz. whether, under all the changes of circumstances in forming new lines of road to new towns which have arisen in different situations, passengers may still be compelled to go by ancient ferries which would otherwise be disused.] *Cur. adv. vult.*

The judgment of the court was delivered in this term by

Lord ABINGER C. B.—This was an action on the case for the disturbance of the plaintiff's ferry over *Milford Haven*, and was tried before my brother *Parke* at *Haverfordwest*. It was claimed in the declaration in different ways, but the question reserved for the consideration of the court arises on the count which complains of the disturbance of *Nayland Ferry*.

The plaintiff was the lessee, under Sir *John Owen*, of a ferry called the *Pembroke* or *Burton Ferry*, across *Milford Haven*, which was the ordinary communication between *Pembroke* and *Haverfordwest*. He was also lessee under the same gentleman of another ferry from

(*a*) Vol. III. p. 219, citing the passage from 2 Rol. 140, which rests on the Year-Book, 22 *Hen.* 6. 14 b. Stated in this report, p. 862.

the same point, on the *Pembroke* side, to *Nayland* and back; there was no question as to the right of the plaintiff to both these ferries. He claimed also a much more extensive right, that of ferrying all persons backwards and forwards over *Milford Haven*, within no very narrow limits; but this right was negatived by the jury on the trial.

It appeared, however, that the defendant had, before the commencement of this suit, set up a boat to carry passengers from *Nayland* to the opposite side; and, amongst other places, to *Hobb's* point, more than half a mile from the *Pembroke Ferry-house*. At this place a hard or pier had been built, to improve the communication between *England* and *Ireland*, and a road made from thence to *Pembroke*, which communicated with the turnpike-road from *Pembroke Ferry* to *Pembroke*, at a distance of more than half a mile from the ferry; and the way from *Nayland* to *Pembroke* by *Hobb's* point, was shorter than by the *Pembroke Ferry*. There was no town or vill between *Hobb's* point or *Pembroke Ferry*, and the junction of the new with the old road; and, I rather believe, none between that point and the town of *Pembroke*, although the circumstance was not inquired into on the trial.

On one occasion, a boy in the service of the defendant, and in his boat, received a passenger on board at *Nayland*, who, after the boat had been shoved off the shore, informed him he was going to *Pembroke*, and desired to be put on shore at *Hobb's* point, which was done.

The jury having found for the defendant on the other questions in the cause, these points were reserved for the consideration of the court; first, whether the defendant was responsible for this act of his servant; and, secondly, whether, if he was, the facts proved amounted to a disturbance of the plaintiff's right of

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ferry; the jury having negatived any fraud in fact on the part of the defendant or his servant.

A rule nisi having been granted for a new trial, the case was argued before my brothers *Parke*, *Bolland*, *Gurney* and myself.

Upon the first point there is no difficulty. The servant was acting at the time in the course of his master's service, and for his master's benefit; and his act was that of the defendant, although no express command or privity of his master was proved; *Turberville* v. *Stampe* (a).

The second point is one of a more doubtful nature, and has called for much consideration. It is quite clear that a ferry is a franchise which none can set up without a licence from the crown, and in the case of a ferry by prescription, a grant or licence is presumed. As early as in the Year-Book, 22 *Hen.* 6. 14 b., it is thus laid down by *Paston:* "If I have of ancient time a ferry in a town, and another sets up a ferry upon the same river, near to my ferry, so that the profits of my ferry are impaired, I shall have against him an action on the case:" and *Newton* says, "The case of a ferry differs from that of a mill, for you are bound to sustain the ferry, and serve and repair it in ease of the common people, and it is inquirable before the sheriff in his town and justices in eyre." This proposition is quoted in 2 Roll. 140 (G), pl. 4. Com. Dig. *Piscary* (B), and *Action on the Case for a Nuisance* (A), and in most of the cases where the rights of ferry have come in question.

In the case of *Churchman* v. *Tunstall* (b) in the Exchequer, in the time of the Commonwealth, 1659, the plaintiff, the farmer of a ferry at *Brentford*, as it would seem, under the crown, filed a bill for an injunction to

(a) 1 Lord Raym. 265; see as to this case, *ante*, Vol. I. 51, n. (a).

(b) Hardres, 162.

strain the defendant, who had lands on both sides of e *Thames*, three-quarters of a mile off, and who was the habit of ferrying passengers across, from conuing to do so. The bill was dismissed without sts; but the reporter adds a query as to the proriety of the decision; and even if it was right, it is no thority against the maintenance of an action on the se. The decision, however, appears to have been rong; for upon another bill filed in 1663, a decree as made by Lord *Hale* on the 18th *June*, 14 *Car.* 2. i favour of the same plaintiff, that the new ferry ould be put down.

In *Blissett* v. *Hart* (*a*) the plaintiff recovered in an tion on the case against the defendant for setting up nother ferry over the same river near the plaintiff's rry, and ferrying over persons and horses over the ame river near the plaintiff's ferry, by which she was bliged to let it for less rent than before, and had been eprived of great part of the profit of it. On motion i arrest of judgment, the court held the declaration to e good; and they said, that "a ferry is a franchise hich no one can erect without a licence from the own, and when one is erected, another cannot be ected without an ad quod damnum. If the second is ected without a licence, the crown has a remedy by o warranto, and the former grantee has a remedy by tion. The franchise is the ground of the action (*b*).

So far the authorities appear to be clear, that if a ew ferry be set up without the king's licence, to the rejudice of an old one, an action will lie; and there is o case which has the appearance of being to the conrary, except that of *Tripp* v. *Frank*, hereafter menioned. These old authorities proceed upon two rounds; first, that the grant of the franchise is good

(*a*) Willes, 508. (*b*) Willes, 512, n.

rupts the grantee in the exercise of h
withdrawing the profit of passengers, v
otherwise have had, and which he has i
chased from the public, at the price
sponding liability, the disturber is subje
for the injury, and the case is in this re
to the grant of a fair or market, whicl
vilege in the nature of a monopoly.

A public ferry is then a public highw
description, and its termini must be in p
public have rights, as towns or vills
leading to towns or vills. The right of
in the one case, an exclusive right of
town to town; in the other, of carrying
to the other, all who are going to the
vill, to which the highway leads on t
Any new ferry, therefore, which has the
away such passengers, must be injuriou

For instance, if any one should co
landing-place at one terminus of the fer
practice of carrying passengers over f
terminus, and there landing them at t
which they pass to the same public
which the ferry is established, before
town or vill, and by which the passen

modious, or the fare less, it is obvious that all the om must inevitably be withdrawn from the old y, and thus the grantee would be deprived of all eft of the franchise, whilst he continued liable to he burden imposed upon him.

t does not follow from this doctrine, that if there be ver passing by several towns or places, the exist- e of a franchise of a ferry over it from a certain nt on one side to a point on the other, precludes the g's subjects from the use of the river as a public hway from or to all towns or places on its banks, l obliges them upon all occasions, to their own in- venience, to pass from one terminus of the ferry to other. The case of *Tripp* v. *Frank* (a) decided erwise; and it is not intended to question that ision. It was there held, that the plaintiff, who a right of ferry from *Hull* to the town of *Barton*, no right of action against a person who carried engers from *Hull* to *Barrow*, a place on the banks he river at some distance from *Barton*. But suppose had known that the passengers were going by that te to *Barton*, and that their sole object was to go e; or suppose that *Barton*, instead of being a few dred yards from the *Humber*, was a mile distant, was the first town with which either ferry commu- ted, it would not follow from that decision, that in a case passengers might be landed at *Barrow* the purpose of going to *Barton*.

Ve have thought it right, in consequence of the rse taken by counsel in argument, to enter thus far the general question, and to lay down these prin- les, that it may not be supposed that the decision to ich we find ourselves obliged to come, can in any y affect the plaintiff's right to the exclusive pri-

(a) 4 T. R. 666.

the rule absolute.

It is to be observed, that between *I*
the junction of the two roads that lead
and from *Pembroke Ferry* respectively
Pembroke, there are intermediate poir
passenger *Llewellyn* might be going; tl
was his ultimate object, it might not be
and if he had any particular view o
making *Hobb*'s point the place of hi
could not have been accomplished as v
Pembroke Ferry, then, according to tl
down in the case of *Tripp* v. *Frank*, tl
been no evasion of the plaintiff's ferry.
the intentions of *Llewellyn* are left very
the evidence; and it does not appear
that the counsel on either side though
them by any inquiry. And if this ha
question which the parties intended
might have been disposed to direct a
we cannot fail to observe, that the m
fact in difference were fully tried and
the jury; and that the point stated u
evidence was laid hold of for no oth
that of recovering a verdict for the plain
after all the matters really in differen
cided against him. The court is the

e aware, and must have understood, that he had no ɜr object. Now the communication made by *Llew-* n to the defendant's servant, after the boat had com- ıced her passage, is not inconsistent with his having ıe legitimate object in going to *Hobb*'s point, be- ɜs that of going to *Pembroke*. The uncertainty refore in which this point has been left by the evi- ıce, makes it impossible to say that the facts proved ounted to a disturbance of the plaintiff's ferry; ırefore the rule cannot be made absolute to enter a ıdict for the plaintiff. And we think the plaintiff, in ıse of this sort, is not entitled to a new trial, that he ıy amend his evidence upon an incidental point, upon ıich he left it too doubtful to be properly submitted the jury. The rule therefore must be discharged.

Rule discharged.

JENKINS, Executrix, *against* HARVEY.

ASSUMPSIT by the executrix of the lessee of the corporation of *Truro* for metage, viz. a toll or

Assumpsit for a toll in the nature of a port-duty.

ı first count stated, that the mayor and burgesses of the borough of *Truro* had, n time whereof the memory of man was not to the contrary, held and exercised the mayor of the said borough, or the lessee or lessees of the said mayor &c. for time being, or their deputy or deputies, a certain ancient office or place of meter the measuring of all coal imported by sea, and brought within the limits of the t of *Truro*, to be there disposed of, and that from time whereof &c., there had ınged to the said mayor and burgesses, by reason of the said office, an ancient reward, or toll, for the measuring as aforesaid, and for the keeping and main- ing of measures, weights, &c., *i. e.* the fee &c. of 4*d.* the chaldron, to be received the measuring, or being ready and willing to measure each chaldron of coal im- ted as aforesaid, to be disposed of by measure, and the fee &c. of 8*d.* by the ɜ tons, to be received for the weighing (*or being ready and willing to weigh*) ı chaldron of coal imported as aforesaid, to be disposed of by measure. Aver- ıt, that the corporation demised to the plaintiff the office of meter, with the fees privileges belonging to it, under which the plaintiff claimed a toll from the de- ıant, in respect of a cargo of coals imported by him into the port of *Truro*. In ther count the office was not stated to be immemorial, and in others the toll was

21 *February* 1752, was gone through
proved that the plaintiff offered to meas
ant's coals and was refused. To account f
duction of documents of earlier date, it wa
lately, the books and papers of the corpo
kept in a very insecure and ill-managed
corporation book of the date of 1630
though not used as evidence in the cau
then deposed, that the corporation had

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claimed as receivable by the corporation or their lessees from all
by sea within the limits of the port. The jury returned a ver
follows :—" We find for the plaintiff, and that the corporation o
time immemorial been possessed of, and have exercised the office
from time immemorial received for the performance of the duti
sum of 4*d.* a chaldron on coal and culm. We do not find for t
other count." Held, that this finding was meant to be on the first
it the jury did not intend to negative the title of the corporation o
metage as connected with the port, or to disconnect the office of m
to the port, or to import that the corporation were only entitled to the
measurement of the coals, but meant to affirm their claim to the r
grounds which would support it in law, without performing th
measurement for it, viz. their ownership of the port and obligati
and consequently that the first count of the declaration was suppo

Held also, that such finding embraced the claim of 8*d.* by
weighing, or being ready to weigh the coal imported.

Held also, that no objection to the toll could be sustained on th
ness, it being due to the corporation as owners of the port, as wel
suring.

Acts of ownership and repair of the port by the corporation w
leases of the office of meter of the borough, of the fees accruing fro
grain, coal, &c. exported or imported within the limits of the p
produced, the first dated in 1752 in consideration of 631*l.* The
1795. The fee of 4*d.* per chaldron was shown to have been pa
from 1772 to 1828, though the actual measurement was not b

ceived dues on the importation of flour in sacks, though eir meter had never measured the flour. The questions left to the jury by the learned baron were three; st, whether the corporation of *Truro* and their lessees nd deputies had from time immemorial held and exercised the office of meter of coals entering the harbour r a toll, fee, or reward of 4*d.* per chaldron, or 8*d.* for ree tons, for measuring and weighing:—secondly, hether they had held such immemorial office and ere entitled to a reasonable fee, and whether 4*d.* or ny smaller sum was reasonable:—thirdly, whether he corporation was entitled to this fee as a port duty, n which case it need not have existed from time immemorial. The jury, after remaining together all night, eturned a "verdict for the plaintiff on the metage." he learned baron asked whether they found that the orporation possessed the office of meter and were entled to a reasonable reward for measuring, and also ut that reasonable reward was 4*d.* The foreman nswered "Yes." The learned baron then asked hem, if they found for the plaintiff on the port duty. he foreman answered "No." Another juryman then id, "We think the corporation entitled only on the ne performance of the office." Another said, "We nd the office immemorial and the fee also immemorial, ut they are to do all the work for the money." Another added, "We find but one thing." The counsel ffered as to the manner in which the verdict should e entered, on which the learned baron desired the ry to retire and bring in their verdict in writing, hich they did as follows:—"We find for the plaintiff: —and that the corporation of the borough of *Truro* ave from time immemorial been possessed of, and ave exercised the office of meter, and have from time mmemorial received, for the performance of the duties f the office, the sum of 4*d.* per chaldron on coal and

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culm. We do not find for the plaintiff on any other count." The verdict was then entered for the plaintiff on the first count only for 16*s*. damages. In last term, Sir *John Campbell*, Attorney General, obtained a rule nisi for a new trial on two grounds. First, that the written verdict amounted to a finding that no fee was due unless the coal was actually measured by the meter, whereas the first count went for a fee for measuring or weighing, or being ready and willing to measure or weigh. Secondly, that had the verdict been simply for the plaintiff on the first count, or if the jury had in terms affirmed all the facts there laid, *e. g.* the immemoriality of the corporation, of the office of meter, and of the fee claimed for measuring or being ready to measure coal imported, there would not be evidence sufficient to support such a finding.

Sir *William Follett* and *W. C. Rowe* shewed cause. The fallacy involved in the first point, is that of considering the right to metage to be distinct from a right to port duty, whereas in their origin and nature they are identical, metage being in fact a port duty arising from the ownership of the port, though its existence must be immemorial, which, if claimed as a mere port duty, need not be proved. The corporation might either have been entitled to receive a toll of 4*d*. without doing any thing for it, or they might be bound to do something for it. [*Parke* B. That seems to be what the jury meant, viz. that the corporation were not entitled to the toll of 4*d*. without doing more than cleansing the port.] The corporation would be bound to measure coal imported, and would be liable to an action for not doing so. But toll is not a payment for work done, and might therefore be recovered quâ toll, notwithstanding the neglect of the owner to perform the duties of the office of meter. Then the jury

could not in law find that the defendant was excused from paying toll by any such neglect of the plaintiff. As to the other ground of the evidence not supporting the allegations, it was proved, and not contradicted, that as far back as living memory reached, the corporation had existed and the office been exercised; and that for a similar period the fee of 4*d.* had been received by the lessees of the corporation, whether the coal was measured or not. That is sufficient evidence of immemoriality, in the absence of any evidence to rebut it. The verdict is in terms for the plaintiff, and could not be so found, unless the being ready and willing to measure had been considered by them to be equivalent to actually doing so, so as to entitle the lessees of the toll to receive it. The only part of the plaintiff's case which they negatived, was the plaintiff's right to this toll as a modern port duty granted since legal memory. [*Parke* B. The finding is silent as to the 8*d.* for every three tons.] It was not necessary that it should particularize every allegation contained in the declaration. [*Alderson* B. You say, that what is adverted to by the jury in specific terms, is so mentioned by way of instance and illustration, and that what they do not so mention, is included as found by them in their general verdict for the plaintiff. That must be so in some respects.] It may be stated generally, that the liberty to bring goods into a public port, being a place of safety in itself, imports a sufficient consideration for a claim of this kind by the owners of the franchise of the port, in respect of having made the port and keeping it in a state fit for the safe reception of ships resorting thither. See *Hale de Portibus Maris* (*a*), *Mayor and Commonalty of London* v. *Hunt* (*b*), *Mayor of Yarmouth* v. *Eaton* (*c*), *Mayor of Exeter* v. *Trin-*

(*a*) Cap. VI. Hargrave's Law Tracts, 74, 76, 77.
(*b*) 3 Lev. 37.
(*c*) 3 Burr. 1402.

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let (*a*), and 9 *H.* 5. c. 10. This right to toll in consideration of a constant readiness to confer a public benefit, if required, was illustrated in *Lord Falmouth* v. *George* (*b*). *Senan* cove had been made a place for landing boats by human labour. The plaintiff and his ancestors were bound by custom to maintain a capstern and rope, to haul boats to land there in bad weather; and though it appeared that he was only owner of the land on which the capstern stood, and was not seised of the soil of the cove, or of any land, manor, &c. in respect of which he could claim to receive a toll (*c*), yet a custom for him to take the second best fish out of every boat landing fish there, was held good, whether the capstern was used or not. Again, persons landing within a manor, may be bound in law to pay toll traverse to the lord, though they do not land at the wharf provided for them. The bad condition of a port is no defence to a claim of toll, which rests on the ownership of the port. *Vinkersterne* v. *Ebden* (*d*) affords a cause of action against the owner for not keeping up the port, *Mayor of London* v. *Hunt* (*e*). This usage may well be immemorial, for coals were seaborne, and even a subject of litigation in *London*, in 34 *Ed.* I., see *Rex* v. *Carpenter* (*f*). Again, *Macculloch's Dictionary of Commerce, tit.* Coal, states, that in *Henry* the Third's time, *Newcastle* had a large trade in that article, which, about the end of the 13th century, was imported into *London* for use in manufactories. Nor is it bad for rankness. In *Vinkersterne* v. *Ebden* (*g*), the *Newcastle* corporation established a toll of 5*d.* a chaldron. A toll of 4*d.* is mentioned in *Brownlow's Entries*, 119, and 8*d.* a ton for cheese was held good in *The Mayor*

(*a*) Cited 3 Burr. 1405, 1407.
(*b*) 5 Bing. 286.
(*c*) As to this see 3 Burr. 1407.
(*d*) Lord Raym. 334.
(*e*) 3 Lev. 37.
(*f*) 2 Shower, 49.
(*g*) Lord Raym. 334.

of London v. *Hunt* (*a*). Again, 9 *H.* 5. c. 10. shows, that the crown then received a customary toll of 2*d.* for each chaldron of coals brought from inland into the port of *Newcastle*, and sold to persons not franchised there. [*Alderson* B. *Pelham* v. *Pickersgill* (*b*) established an immemorial toll of 4*d.* for every loaden waggon passing the bridge at *Boroughbridge*.] The jury have found the toll reasonable, which excludes this court from dealing with the subject; for *Pyke* v. *Dowling* (*c*) shows, that a question as to immemorial existence of a modus, is a question not of law but of fact.

Sir *John Campbell*, (Attorney General,) *Merewether* Serjt., and *Crowder* supported the rule. The jury have denied that this payment is a port duty, so that their verdict in favour of its being due for metage, will not establish a toll in that name, on coals imported by sea into the port of *Truro*, if it is against common right for want of consideration, which in this case must be actual measurement performed. To go through that process on the quay is wholly useless (*d*), as the coal importer must measure them out again, when sent out from his premises to his customers. It does not appear that toll was ever paid when no measuring in fact took place. In this case the defendant declined to have his coals measured. Can then the toll claimed be due in respect of the readiness to measure them? [*Parke* B. Had the jury thought that it was not, they must have found for the defendant. The right to metage was not put by the judge as belonging to the corporation, as lords of the port, or as an immemorial prescription in right

(*a*) 3 Lev. 37. (*b*) 1 T. R. 660.
(*c*) 2 Bla. R. 1257.
(*d*) For the customs duties on coals carried coastwise were abolished in 1831 by 1 & 2 *W.* 4. c. 16. s. 1., see *ante*, 332.

office," cannot mean merely the "being
sure," which is the allegation on whic
must rest to support the first count. T
not like a port duty, it more resembles
to the office of meter and payable for th
tion of the duty annexed to that office,
both office and fee must be immemori
The plaintiff says, that whether imme
this is an office belonging to the port, wl
holder to a certain fee for actual measu
ness to measure. If so, it might be cre
times, for the crown has a clear preroga
a reasonable burden on persons freq
made for the public benefit, and to
cleansing of which the owners are bo
payment may have had an immemorial
if it is in the nature of a port duty, as i
the plaintiff, that incident would not
maintain it. The evidence of ownersl
and cleansing it, is consistent with t
Mayor of Yarmouth v. *Eaton* (*a*).] The
title is the lease, which treats this payn
ing any thing to do with the port or wit
to cleanse or repair it, and mentions it a
quent on the exercise of the office of me
performing a certain duty annexed

ıed by the sack, if it is of the right dimensions, and meter's duty is to satisfy himself that it is.

ut what proof is there of the immemoriality of r the corporation or the office? or that coals were rted into *Truro* at the time of *Richard Cœur de* 's return from *Palestine?* or that they were then ıured by chaldrons? The charter of *Reginald roy*, Earl of *Cornwall*, does not affect to incorpo- *Truro*, for an Earl of *Cornwall*, not having the *regalia*, could not do so. The charter of *Eliz.* ıot relied on at this trial. The documentary evi- e commences as late as the lease of 1752, which not refer to any prior demise of the tolls. How ıuch a combination of improbabilities as this, raise resumption of this office and payment being im- ɔrial? [*Parke* B. The absence of ancient docu- s in support of the claim, was a strong circumstance he jury against the plaintiff. *Alderson* B. The ıdant did not show the origin of the payment by ary evidence.] Again, the amount of the pay- makes its commencement beyond legal memory lible (*a*). The value of silver in *Henry* the ıd's reign, is computed by Lord *Lyttelton*, in his y of that reign, to have been at least five times r than when he wrote. Sir *F. Morton Eden*'s on the state of the poor in 1797, states, that in the price of coal in *London* was only 6*d.* a r. The lease of 1752 grants the office of meter *borough:* that confirms the position that the had its true origin within legal memory, in con- nce of stat. 8 *Hen.* 6. c. 5., which enacted, that ry city, *borough*, and town in *England*, a common ce and common weights should be kept in the ng of the mayor or constable, at which all the

(*a*) See 2 Eagle on Tithes, 185.

a penny at the most. The officer
was to be rewarded by the discret
men of the city, &c. "according to l
his said business, be it more or less."
22 Car. 2. c. 8. that the above provi
law in ports. The fee in the statute
nearly the 4*d.* a chaldron, estimating
Henry the Sixth's reign. Coals have
weighed, but that was not made nec
and the claim for measuring was prol
A reasonable origin for the office b
within time of legal memory, the co
this payment to immemorial usage, upo
dence adduced in support of the pres

The judgment of the court was aft
in this term by

PARKE B., who, after stating the
fore mentioned, as to the several s
jury to the learned judge, and the te
verdict, and that no objection was m
in which the case was left to the ju
follows:—

The objections made on the argum
the rule for the new trial in this case

The first count claims that the corporation have immemorially exercised the office of meter, for an immemorial fee or reward of 4*d.* per chaldron, for the measuring, or being ready and willing to measure, by measure, each chaldron of coals imported by sea and brought into the port (*a*); and for the keeping and maintaining weights and measures; and the plaintiff claims as the lessee of the corporation of the office and toll, averring that he was ready and offered to measure by deputy; and there is a similar claim of 8*d.* for every three tons weight. In other counts the office is not stated to be immemorial. And the fifth count claims a duty or toll, called metage, from every merchant importing coal by sea within the limits of the port, to be there unloaded and delivered or disposed of, without any averment of the measuring, or being ready to measure, the coal. And in part of the sixth, or *indebitatus* count, it is claimed in a similar mode. It is obvious that the finding of the jury was meant to be on the first count. It is contended for the defendant, that the claim for metage, as a fee or perquisite of office for measuring or being ready to measure, is not supported by the verdict, because the jury have found that the corporation have received "for the performance of the duties of the office" the sum of 4*d.*; and it is said, that the "performance of the duties of the office," means the actual measurement of the coals. The court have never had the least doubt as to the meaning of the finding of the jury in this respect.

The great point in controversy at the trial was, whether the plaintiff was entitled to a payment of 4*d.* for all coals imported, though he did not actually measure; the plaintiff contending that he was, the defendant that he was not: but the defendant, at the

(*a*) See *Colton* v. *Smith*, Cowp. 47; Lofft, 463, S. C.

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same time, not disputing that the plaintiff might have the sole right of measuring all coals imported, which were required by the parties to be measured within the limits of the borough; nor that he was entitled to a fee of 4*d.* if they were measured by him, or to damages for an infringement of the right of his office, if they were measured by another. The question then being, whether the plaintiff had a right to the fee without actual measuring, it is impossible to suppose that the jury could have found a verdict for him, if they had been of opinion that he was not entitled, unless he did actually measure. "The performance of the duties of the office," therefore, must mean something else, in order to be consistent with the finding for the plaintiff; and the only meaning which can consistently be attributed to those words is, that the corporation is not entitled, unless by their officer they measure, or are ready to measure. They are not entitled to the 4*d.* per chaldron, absolutely and unconditionally. Another objection, not strongly insisted on, was, that the jury do not say, whether the corporation are entitled to 8*d.* per three tons for weighing; but there can be no doubt that they intended to include both the 4*d.* metage, and its equivalent sum of 8*d.* for weighing.

It is also contended, that the jury meant to negative the right of the corporation to the metage, as connected with their interest as owners of the port, or their obligation to maintain it; and if they did so intend, it appears to us that there would be an insurmountable difficulty in supporting the verdict on the first count. Taking the office of meter to be simply an ancient and prescriptive office of the borough, to which the exclusive right of meting is attached, and in respect of which the public derive no benefit, unless their goods are actually meted by him, we cannot think a custom would be good, which gives the officer a fee for doing

ıg. It would be a custom, obliging all persons ing coal within the bounds of the port, to be there ded or delivered, to have them measured, whether chose it or not—whether they intended to use in their own houses, or to send them into the ry to be there sold; and the only consideration ıat obligation would be, the keeping a measure by orporation, and the being ready to use it; and case would resemble that of *Warren* v. *Pri-* :(*a*), and *Haspurt* v. *Wells* (*b*), and would differ that of *Lord Falmouth* v. *George* (*c*), in which the ing up a rope and capstern in a cove, to draw ı through the breakers, was held to be a benefit to ho frequented the cove, though they did not use r, because it was for their safety that those articles ld be kept up ready for them. In this case, no rters who did not require their coals to be mea- l, could possibly derive any advantage from the tenance of a bushel, or the establishment of the ı of meter. But if the office of meter is connected the rights of the corporation of the port, or with obligation to repair and cleanse it, the public undoubtedly a sufficient consideration to oblige to pay a toll or duty, to the owners of the port, ervices not performed. They have an equivalent e use of the port, for any reasonable toll on the s imported, and as such a toll could be granted by the crown, there could be no doubt of the va- ' of a prescriptive claim to it. The case of *The or of London* v. *Hunt* (*d*), which was a claim of hage of cheese, and *The Mayor of Yarmouth* v. *n* (*e*), which was one of measurage of corn, are de- e authorities to this effect. The present case

1 Mod. 104. See Hale de Portibus Maris, part 2, ch. 6; Harg. Law , 78.
(*b*) 1 Mod. 47.
5 Bing. 286.
(*d*) 3 Lev. 38.
(*e*) 3 Burr. 1402.

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differs in some respects from those, but falls within the same principle, if the right be connected with the ownership of the port; for here the right of the corporation to the toll is not merely in consideration of the use of the port, but also of the obligation to repair and cleanse it, and of the additional obligations not merely to provide measures, but also a competent person to perform the duty of measuring faithfully and justly, if required to do so.

The only question, therefore, on this part of the case is, whether the jury, by the mode in which they found for the plaintiff, and by the observations accompanying their finding, meant to disconnect the right to the office of meter, from the right of the corporation to the port; and to find, that the corporation were not entitled to the metage, in respect of their ownership of the port, and obligation to cleanse it. Now if the ultimate written finding of the jury be considered by itself, there is no reason whatever to suppose that they intended to negative the title to the metage as connected with the port. They must be considered as having found the plaintiff's claim to the metage, upon the grounds on which alone it can be supported in law, on which it is clear, from the statement at the bar, and from a very full note by the learned judge of the speech of the counsel for the plaintiff, the case was mainly rested on behalf of the plaintiff. But there is an answer by the jury to a question of the learned judge, which, on the first view, seems to show that the jury negatived the claim to this duty or toll, as connected with the port; for the learned judge had previously asked the question, whether they found for the plaintiff on the port duty, and they answered in the negative. But it appears to us, on considering the whole of the learned judge's note of that which passed, that the jury could have meant no more than to find against the plaintiff's right

ty or toll on coal, merely as a port duty; that
ed simply for the use of the port, and without
:r obligation on the part of the corporation to
hing more, which is the mode in which the
imed in the fifth and sixth counts of the de-
They found in effect that the corporation
d to measure, if the measurement should be
We therefore think that the finding of the
orts the claim in the first count, as a toll con-
th the ownership of the port.
:xt question is, whether there is sufficient evi-
support the finding. It is contended that
s,
none that the corporation was immemorial;
lly, none that the office was immemorial;
y, that the fee was too great to be immemo-
l,
ly, that the evidence did not support a right
in respect of coals imported, whether meted

ears to us, that there was sufficient evidence
nt the verdict for the plaintiff on all these
so that we cannot set aside the verdict as
ainst the evidence. The proof of the imme-
of the corporation is slight, for no ancient
or documents were produced, showing that it
some centuries ago. Where a prescription
: expected to be proved, if it exists, by more
ng memory, the absence of such proof is no
strong point for the jury. There however
of that there was a corporation in 1630; and
contradicted, is certainly evidence from which
may presume that it had existence beyond the
legal memory. This point is one which was
n dispute.
ilar observation applies to the office, which was

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proved to exist in 1752, and to be then worth 600*l.* for the term for which it was granted; and that is abundant evidence from which the jury may and ought to presume it to be prescriptive, if that be necessary to make it valid, unless the contrary be proved; especially, accompanied with the circumstance, that no early documents belonging to the corporation were to be found.

The objection as to the rankness of the toll is untenable, if it be a toll due to the corporation for the use of the port, as well as for the measuring of the coals; and we have before intimated, that the claim can be supported on that ground alone, and that the jury must be considered as having so found.

The last objection is, that the evidence does not support the claim to a toll for coals not actually meted.

There was very satisfactory proof that the lessee received the dues now claimed, from the year 1772, under a lease granted in 1752, on all coals imported; it was equally clear that the meter never actually measured them, and yet received the fee of 4*d.* per chaldron as if he had. It is true, indeed, that all the coals imported were always measured by some one, but that measurement was one that originated in the statute of *Anne*, imposing a duty on coals; it was for fiscal purposes, in order to ascertain the amount of a tax, and with such a species of measurement, the ancient meter, whose duty it was to mete between one party and another, could have nothing to do, and was under no obligation to perform it. If, therefore, the lessee of the toll received 4*d.* a chaldron on all coals, no otherwise measured than for customs, it is in truth the same for the present purpose, as if he received on all coals imported though never measured at all.

It appears also that the tolls were paid to the meter on bags of flour, and that these were never measured by any one for any purpose. And a clear usage from the

year 1777 for the lessee to receive toll on goods imported, though never measured, coupled with the proof of this being a valuable right in 1752, is amply sufficient to warrant the jury in presuming the practice to have existed time out of mind, and in referring it to a legal origin, which cannot well be, without connecting the right to the toll with the ownership of the port, which ownership was fully proved.

It may be observed, that the usage, if established, cannot be referred to the statute of *Hen.* 6. as its legal origin; for, in the first place, that statute applies to weight only, not to measures, and if it did, its provisions would give no legal right without actual measurement. Whereas in this case a right to toll without measuring is to be referred to some legal origin.

For these reasons we think the verdict ought not to be disturbed, and the rule for a new trial must be discharged.

Rule discharged.

HEMMING *against* TRENERY and MALIM.

ASSUMPSIT. The declaration stated that before &c., one *Streather* had contracted for the perform-

R. S. a builder, contracted to perform certain works

for government, and having given a bond to the Crown for the due performance of the work, applied to the plaintiff to supply him with bricks to carry on the works, which he did on the faith of the following guarantie, signed by the defendants as sureties. "Please to deliver to *R. S.* for the completion of his contract at *Deptford* and *Woolwich* yards, 500,000 of the best stock bricks, to be delivered at the said dock-yards at 32*s.* per thousand; and we, as his sureties, do hereby consent that the proper officer, *Navy Office, Somerset House*, who shall or may have the payment of the contract when finished, shall and may stop the amount of such account for bricks delivered; and we do hereby agree to become guarantees for the payment of the same to you when the amount of the contract is paid." After the bricks were delivered *R. S.* partially performed the work, and requiring an advance of money, applied to and received from the Crown, with the plaintiff's consent, 300*l.* on account, and afterwards executed extra work, for which he was entitled to 284*l.* 5*s.*,

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ance of divers works and services, and for finding and providing materials at *Deptford* and *Woolwich* dock-yards; and thereupon theretofore, to wit, on &c., in consideration that the plaintiff, at the request of the defendants, would deliver to the said *R. Streather*, for the completion of his said contract at *Deptford* and *Woolwich* dock-yards aforesaid, 500,000 best stock bricks, and deliver the same at the said dock-yards at 1*l.* 12*s.* per thousand, they the said defendants consented that the proper officer of the *Navy Office, Somerset House*, who should or might have the payment of the contract when finished, should and might stop the amount of such account for bricks delivered, and they did then agree with and promise the plaintiff to become guarantees for the payment of the same to him when the amount of the contract was paid. The declaration then averred the delivery to *Streather* of a large quantity of bricks, amounting to the sum of 800*l.*, and although the credit and time for payment had long

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but was subsequently dismissed by the Crown for neglect, in having only partially executed his contract; other persons were employed at their own prices to complete it, and the Crown paid for the work accordingly, without the assent of either *R. S.* or the defendants. After the whole undertaking had been perfected, an arrangement took place between the Crown and *M.*, one of the defendants, on behalf of himself and his co-surety, and with the privity of *R. S.*, and an account was stated by the proper officer, between the Crown and *R. S.*, in which *R. S.* was credited with the amount of the contract prices, and 284*l.* 5*s.*, for extras, and debited with the 300*l.* paid him and the sum paid to the persons employed to complete the contract, leaving a balance of 241*l.* 16*s.* 1*d.* for which a bill was made out payable to *R. S.*, specifying it to be a balance upon a final settlement of all claims which he, or any one through him, might have on the public in respect of works undertaken and partly performed by him at *Woolwich* and *Deptford*. That bill was given to *M.*, who gave a receipt in the terms of it.

Held, first, that under these circumstances the money paid by the Crown to the persons who completed the works contracted to be performed by *R. S.*, was not money paid to *R. S.* or his agents, and that the whole contract money not having been paid to *R. S.* the plaintiff could not recover on the guarantie.

Secondly, that even if that were otherwise, the plaintiff had no claim on the 300*l.* paid to *R. S.*, having expressly waived it by consenting to the payment.

Thirdly, that if the balance of 241*l.* was to be considered as part of the allowance for extra work done, the plaintiff could have no claim on that balance: and that if it was a sum partly composed of such extras and partly of money due for work done under the contract, the plaintiff could only be entitled to nominal damages, as it was impossible to ascertain what sum was due to him on the latter account.

:e elapsed, and though payment of the amount of nies payable to the said *R. Streather*, under and by :ne of the said contract, was afterwards made, ereof the defendants had notice, yet, &c. Breach non-payment, either by *Streather* or the defendants, the price of the bricks.

The defendants pleaded separately. First, the gene- issue; secondly, that the payment of the amount monies, payable to *Streather* under the contract, d not been made; and thirdly, that the defendants d no notice of payment so made under the contract. 1 these pleas the plaintiff took issue. The defend- ts pleaded, fourthly, that the amount of the monies yable to *Streather* under the contract, was unpaid at 3 time when the action was commenced; concluding th a verification. This last allegation the plaintiff iversed in his replication, and issue was joined ereon. The cause was tried before *Parke* B. at the tings in *London* after last *Hilary* term, when the rned Baron directed a verdict to be entered for the intiff, but gave the defendants leave to move to ter a nonsuit. Sir *W. Follett* obtained a rule ac- rdingly in *Easter* term last, against which, *Andrews* rjt., and *Archbold* showed cause in last term, and, er hearing Sir *W. Follett* in support of it, the court k time to consider. The facts and points relied on argument will be found so fully stated in the judg- nt, that it would be mere repetition to state them re.

The judgment of the court was now delivered by

PARKE B.—This is an action upon a guarantee, ich was tried before me at the sittings after *Hilary* m at *Guildhall*. I directed a verdict for the plaintiff, erving liberty to the defendants to move to enter a nsuit.

with the defendants as his sureties, (1833, gave a bond to the Crown for t wall at *Woolwich* for the sum of 1569 *Deptford* for 1089*l.*, both to be compl manner and time. That *Streather* work, and wanting bricks, applied to tl supplied them to the amount of 560*l.*, guarantee to this effect.

Mr. *H. K. Hemming*,

Please to deliver to Mr. *R. Streather*, for tl contracts at *Deptford* and *Woolwich* yards, 500,(to be delivered at the said dock-yards at 32*s.* per as his sureties, do hereby consent that the p *Office, Somerset House*, who shall or may have contract when finished, shall and may stop t account for bricks delivered; and we do herel guarantees for payment of the same to you whe contract is paid. Dated this 21st day of *August*

Your's &c.

Mark Malin. } Su
Samuel Trenery. }

After these bricks were supplied, *St* performed the work according to the (quiring an advance of money from t

After this payment, *Streather* was employed by the Crown to make a wall of a greater depth than that stipulated for in the contract, and he did so, and was entitled to receive 284*l.* 5*s.* from the Crown for extra work. Subsequently *Streather* was dismissed by the Crown for neglect, the contract being only partially executed, and then the officers of the department employed Sir *Edward Bankes* and Mr. *Baker* to complete it, engaging them on their own terms, and when they had finished the works, paid Sir *E. Bankes* 797*l.* 12*s.* 4*d.*, and to Mr. *Baker* 1602*l.* 15*s.* 9*d.* *Streather* in no way consented to this measure at the time, nor did the defendants.

In *April* 1834, after all the works had been completed, an arrangement took place between the Crown and the defendant *Malim*, on behalf of himself and his co-surety, and with the privity of *Streather*. In making this arrangement, the proper officer stated an account as between the Crown and *Streather*. In that account *Streather* was credited with 1569*l.* and 1089*l.*, the amount of the contract prices, and 284*l.* 5*s.* for extras, and debited with 300*l.* paid to himself in *October*, 797*l.* 12*s.* 4*d.* paid to Sir *E. Bankes*, 1602*l.* 15*s.* 9*d.* paid to *Baker*, leaving a balance of 241*l.* 16*s.* 11*d.*, for which a bill was made out, payable to *Streather*, as being "the balance upon a final settlement of all claims which he, or any one through him, might have on the public in respect of works undertaken and partly performed by him at *Woolwich* and *Deptford*;" and this bill was given to the defendant *Malim*, and he, acting for both defendants, on the 10th *April* 1834 gave a receipt in the same terms as contained in the bill.

Upon these facts the question was, whether the plaintiff was entitled to recover.

The guarantee on which the action was brought, appears to have been framed with a full expectation on

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both sides, that the contract would certainly be performed. The defendants are stated on the face of it to be sureties to the Crown, and the plaintiff must no doubt have relied upon the defendants seeing to the fulfilment of the contract by *Streather;* but there is no contract between the defendants and the plaintiff that *Streather* shall fulfil it, nor any engagement that the money for the bricks shall at all events be paid. This money is payable only upon the condition that the amount of the contract should be paid.

The question then is, whether the amount of the contract was paid to *Streather;* and that was substantially the only question in the case; and it was raised on the fourth issue.

The full amount of the contract price certainly never was in fact paid to *Streather* himself, but it was contended, that the effect of the arrangement with Government was to place *Streather* and the defendant in the same situation as if it had been actually paid.

The whole question therefore turns upon the effect of that arrangement.

On both sides it must be admitted, that at the time it was entered into, *Streather* had broken his contract, and was not legally entitled to any thing under the contract from the Crown, and was liable, as were also the defendants, to the full amount of the penalty of the bond.

Under these circumstances, the plaintiff contends that as *Streather*, with the defendants' concurrence, received 241*l.* 16*s.* 11*d.* as a balance, on a final settlement of all claims on the Government, both he and the defendants must be taken to have agreed with the Crown, that *Streather* should be considered as having fulfilled his contract and done all the works; and therefore Sir *E. Bankes* and *Baker* must of consequence be treated as his agents, and the payment to

them, as a part payment of the contract price to *Streather* himself.

The argument for the defendants, on the other hand, is, that the arrangement amounts to no more than this, that the Crown is satisfied to reimburse itself the extra expense beyond the contract price, occasioned by the breach of the contract, and that the credit given to *Streather* in the account of the full contract prices, is merely a mode of calculating that extra expense, and that the effect of the settlement is, that the Crown pays itself that amount out of the allowance for extras legally due to *Streather*, and really does no more than pay the balance of the allowance for extras after such deduction.

On the trial it appeared to me, that the plaintiff's view of the effect of the arrangement was the true one, but the case did not undergo so much discussion as it has since received, and I must own that I am now satisfied that I was wrong, and my Brothers concur in opinion that I was.

To give to this arrangement the effect contended for by the plaintiff, would be to make Sir *E. Bankes* and *Baker* the agents of *Streather*, contrary to the fact; for most certainly they never were authorized or intended to be authorized to act on his behalf. We ought not unnecessarily to give a meaning to the settlement, which would lead to that result. If, indeed, the settlement could not otherwise have been explained, or the balance received upon any other supposition than that it was a balance of payment for a contract fully completed by *Streather*, and consequently involved an admission that those who did the work were his agents, that consequence must have followed; but it is certainly not necessary to put that construction upon the conduct of the parties to the settlement, for that may be well explained on the supposition contended for by the de-

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fendants, and the latter seems to us to be the more natural and satisfactory explanation, and it also accords with the language of the receipt, which clearly treats the contract as having been partly and not fully executed.

We therefore think that *Streather* is not to be taken to have received the full amount of the contract by himself or his agents, and therefore that the issue which involves that question, should be found against the plaintiff.

We do not think that the plaintiff could have successfully contended, upon the words of the guarantee, that he was entitled to any thing, if the *full* amount of the contract was not paid. But supposing he was entitled to such part as Government chose to pay, on the 300*l.* paid in *October*, the plaintiff had no claim, for he expressly waived it, as appears by his letter, conditionally, "provided sufficient was then left to discharge his claim," and sufficient was then left to discharge his claim, for 900*l.* was reported due. It is true, that the balance (600*l.*) was afterwards lost by *Streather*'s neglect to fulfil the contract, but it is clear that the condition referred to the then state of the account, to a matter which could at that moment be decided, and according to the state of the account more was due. The licence was therefore absolute, and the plaintiff's claim was waived on this 300*l.*

And if the defendants be right (as we are inclined to think they are) in saying, that the balance of 241*l.* 15*s.* 4*d.* was really paid as part of the allowance for extras, then the plaintiff could have no claim on that balance; and if it was a sum partly composed of extras, and partly of a portion of the sum reported to be due for work done under the contract, it is impossible to say what amount is to be ascribed to the latter; and in that

view of the case, the plaintiff could only claim nominal damages.

The question in the case, however, is, whether the whole amount has been paid; and we are of opinion that it has not, and therefore the rule must be made absolute for entering a nonsuit.

Rule absolute accordingly.

The KING *against* PHILIP RAWLINGS—Ex parte HAND.

Lands were bought at a sale by auction under an extent. The purchaser afterwards resold them for a less sum than that which he had given. No conveyance having been executed to him, he was desirous to save the ad valorem stamp duty on such a conveyance, and the court, with consent of the Attorney-General, ordered the name of the sub-purchaser to be substituted for that of the original purchaser in the original contract of sale, and that the conveyances should be made to the latter, the sum paid into the bank by the original purchaser being stated in them to be the consideration.

THREE distinct writs of extent had issued against *Rawlings*. From the inquisition it appeared that he was seised of certain hereditaments in the parish of *White Waltham*, in the county of *Berks*, which the sheriff had seized and taken into his majesty's hands. The usual order for sale under 25 *Geo.* 3. c. 35. was made on 25 *November* 1823, and the estates were accordingly sold by auction on the 14 *November* 1828, before the remembrancer of the court of Exchequer, in different lots, when *Hand* purchased lots 1 and 4. This purchase was reported to the court on the 15th *November* 1828, and by an order dated 28th *November* in that year, the report was confirmed absolutely, and Mr. *Hand* was established the purchaser of lots 1 and 4 at the prices therein mentioned. On the 24th *July* 1829, the usual order was made for Mr. *Hand* to pay his purchase-money into the bank, and that thereupon he should be let into possession, " and that all proper parties do join in and execute proper conveyances and assurances to the said *William Hand* of the said estates

for a less sum than he had given for
veyance having been executed to Mr.
desirous of saving the *ad valorem* sta
conveyance to himself. But Mr. *H.*
vised not to accept a conveyance dire
membrancer, without the sanction of th

Boteler moved on behalf of Mr. *Han*
might be substituted for him, and de
chaser of the mansion-house and p
the stead of Mr. *Hand;* and that the
of the court of Exchequer and all prope
join in and execute proper conveyan
H. Pole, his heirs and assigns, in l
W. Hand. He cited as a precedent a
the matter of the same extents, *Ex pa*
who had purchased lot 2 at the above
before the master, for 2500*l.*, and a
purchase-money into court under an
9th *July* 1830, had undersold the s
and the court, with the Attorney-Ge
made an order whereby the new pur
stituted, and the conveyances were ord
to him.

Pole on behalf of the purchaser. A

quer remembrancer, under direction of the court, and after the making of such conveyance, and its inrolment, as in the act directed, the bargainee or bargainees in such conveyance, and his or their heirs, executors, administrators, and "assigns," "shall have, hold, and enjoy the lands, &c. therein comprised, for his and their own respective use and benefit." Difficulty has long been felt by conveyancers on similar words in the old forms of powers of sale and exchange, that they exclude the power of conveying to a trustee for a purchaser. Their usual expedient is to recite the trustee to be a purchaser, and to convey to him, and then, by a separate deed, to make him declare the uses or trusts of the property, according to *Howard* v. *Duncane* (*a*). But that course would not answer Mr. *Hand*'s object, which is to avoid paying the stamp duty on his purchase. While he remains purchaser that course cannot be adopted. The court might, however, rescind his purchase, and order a resale, so as to substitute *Pole* as the purchaser; but as *Hand*'s purchase-money has been already applied under the orders of the court, that course cannot be taken.

Boteler contrà. This act ought not to receive that strict construction, which has properly prevailed in interpreting deeds executed under powers containing these words. Such orders have been frequently made on the authority of the case cited, by ordering the deputy remembrancer to convey to the purchaser, "or as he shall direct." Had not this been done, dower could never have been barred, and the conveyance must have been direct. [*Parke* B. That course is justified by the words of the act, which contemplate, that "under the direction of the court," the bargainee in

(*a*) Turner & Russell, 81.

afterwards made with his consent.

" It is ordered, that the said *H. Pol*
and declared the purchaser of the
estate and premises comprised in lots
the estates in question in this matter, i
stead of the said *W. Hand,* and that u
the said *H. Pole* to the said *W. Hanc*
8500*l.* the said *H. Pole* do retain pc
said mansion-house, estate and premis
tled to the rents and profits thereof, fr
December last: and it is further orde
such payment being made, the tenant o
said estate and premises do respecti
pay their future rent or rents to the
his assigns, to and for his sole use, and
brancer of this court, and all other pr
sary parties, do join in and execute pro
and assurances of the said estate and
said *H. Pole,* his heirs and assigns, a
thereof, or to such other person or pe
said *H. Pole* may direct, instead anc
said *W. Hand,* such conveyances and
settled by the said remembrancer; and
conveyances, or one of them, the sum of
into the bank to the credit of this mat
lots, be expressed to be the considerati

said *W. Hand* of the said mansion-house, estate, and premises, and of all orders, reports, and other proceedings made and taken in the said matter relating to the same; and further, that the said *H. Pole* be at liberty, either in his own name or in the name of the said *W. Hand*, to have, use, and take all such further and other acts and proceedings in this court, and otherwise, as may be requisite and necessary for completing the said purchase on his behalf, in the place and stead of the said *W. Hand*, and for fully and effectually vesting the fee simple and inheritance of the said mansion-house, estate, and premises in the said *H. Pole*, his heirs and assigns, or such person or persons as he may direct or appoint."

DOE on the Demise of EDMUNDS and Another *against* LLEWELLYN and Another.

Lands held by copy of court roll according to the custom of the manor, but not according to the will of the lord, are sufficiently copyhold to pass by will under 55 *Geo.* 3. c. 192. without previous surrender to the uses thereof, though it was found by a special verdict, that before that act passed there did not appear on the court rolls of the manor any entry of a surrender of lands, parcel of the manor and held by copy of court roll thereof, to such uses as should be declared by the last will of the person making such surrender, for no custom in the negative, viz. that copyhold surrendered to the use of a will should not pass by it, was found.

If such negative custom had been found, *semble*, it would have been bad.

By will dated after the passing of 55 *Geo.* 3. c. 192. a testator devised "All the rest, residue and remainder of his estate whatsoever and wheresoever, and of what nature or kind soever the same may be." Held, that copyhold estate would pass by these words as by a general devise of real estate, though the testator had made no surrender in his lifetime to the use of his will.

EJECTMENT. At the trial before *Patteson* J. at the last summer assizes for *Monmouthshire*, the jury found the following special verdict. That *William Edmunds* and *John Edmunds*, on the 31st of *March* 1825, demised the premises in question to *John Doe*. That the several before-mentioned premises, from time whereof the memory of man runneth not to the contrary, have been and still are within and part and parcel

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of the manor of *Abercarne*, in the county of *Monmouth*, and customary tenements thereof, and during all that time have been held and been demised and demisable by copy of court roll, according to the custom of the said manor, but not at the will of the said lord of the said manor: and they further say, that one *Viah Edmunds* being seised in fee of and in the premises aforesaid, on the 10th *December* 1771, at a court then held in and for the said manor, surrendered, according to the custom of the said manor, into the hands of the lady of the said manor, by the acceptance of her deputy steward, the premises aforesaid, being the premises hereinafter mentioned, and being the premises for the recovery of the term whereof the said ejectment as to the first count thereof is brought, to the use and behoof hereinafter mentioned; and at the same court the said lady granted the aforesaid premises with the appurtenants, by copy of court roll, to *Henry Edmunds*, his heirs and assigns for ever, according to the custom of the said manor, by and under the yearly rent of 1*s.* 5*d.*, and other rents and services therefore anciently due and of right accustomed to be paid and performed; and the said *H. Edmunds* then and there gave to the said lady, as a fine for such his estate in the premises, 1*s.* 5*d.*, and did his fealty, and was admitted tenant thereof. That the entry on the court rolls of the said manor of such surrender and admittance is as follows, that is to say:

"Manor of *Abercarne*. } The court baron of *Mary Burgh* widow, mother and guardian of *Charles Henry Burgh*, esq. an infant, lady of the said manor, held at the dwelling-house of *Mary Williams*, spinster, situate at *Newbridge*, in and for the said manor, on *Tuesday* the 10th *December* 1771, before *Robert Blandford*, gentleman, deputy to *Charles Halfpenny*, gent. chief steward of the said manor, and *William John*, *Edward John*, and *Richard William*, homagers there.

"To this court came *Viah Edmunds*, of the parish of *Mynyddslayne*, in the county of *Monmouth*, widow, a customary tenant of the said

own proper person, and surrendered into the hands of the id manor, by the acceptance of her said deputy steward, messuages or tenements, 3 barns, 1 cowhouse, and several els of customary land, commonly called or known, &c. l a description of the premises,] and all her estate, right, property, claim and demand whatsoever, of, in, or to the and every or any part thereof, and the reversion and mainder and remainders thereof, to the use and behoof *unds*, of the parish of *Myhyddysloyne* aforesaid, gent. assigns for ever, according to the custom of the said ich said *Henry Edmunds* the lady, by her said deputy ted seisin thereof, to have and to hold the said premises. rtenants, unto the said *H. Edmunds*, his heirs and as- r, according to the custom of the said manor, by and rly rent of 1*s.* 5*d.*, and other rents and services therefore , and of right accustomed to be paid and performed. *H. Edmunds* hath given to the lady, as of fine for such entry in the premises, 1*s.* 5*d.*, and hath done his fealty nd is admitted tenant thereof.

said *H. Edmunds* having been so admitted as aforesaid, ised of an estate in fee simple in possession of certain ises within the manor, did afterwards, on the 2d *Novem-* ke and publish, in the presence of two witnesses, his last ment in writing as follows:

ame of God, Amen. I, *H. Edmunds* of &c. do make this nd testament, in manner and form following; that is, ive and bequeath unto my daughter *Maria Edmunds* give and bequeath unto my daughter *Catherine Edmunds* f 100*l.*, and unto my daughter *Sarah Edmunds* the like which said several sums or legacies I do hereby direct to my said daughters respectively by my eldest son, H. of my freehold estate, when and as they shall severally ely attain their ages of 21 years, or be married, which ppen; and in case any or either of my said daughters *erine*, and *Sarah*, shall happen to die before her or their r respective ages of 21 years, and unmarried, then I give the share and respective shares of her or them so dying, ivor or survivors of them. [Then followed specific be- ner beds, &c. to testator's said daughters and sons.] All lue and remainder of my estate, whatsoever and where- f what nature, kind and quality soever the same may be, nbefore given and disposed of, after the payment of my

Edmunds, (L. S.) Signed, sealed, published and
testator *Henry Edmonds*, as and for his last will a
presence of us, who at his request in his presence
of each other, have hereunto subscribed our
thereto. *Lewis Isaacs*, *Daniel Edwards*."

That the said premises in the firs
within declaration mentioned, and all
tenements being within and part and pa
manor, and held by a copy of court rol
from time whereof the memory of man
the contrary, passed by surrender and a

That from time whereof the memory
not to the contrary, customary courts ha
in and for the said manor, at which th
said manor holding their lands by co
thereof do suit, and that by the cust
manor, the said tenants are sworn of tl
that the fines are paid and fealty pe
persons who are admitted to any lands
parcel of the said manor; and that a
best beast is payable on the death of
the said manor, holding his lands by co
thereof, and also the widow of every
entitled as her freebench, for the term
the whole of the lands being part and
same manor, and held by copy of court

licence of the lord of the manor by whose lessees, being tenants of the said lands, the said mines and minerals are worked. And that previous to the passing of 55 *Geo.* 3. c. 192. to remove certain difficulties in the disposition of copyhold estates by will, there does not appear upon the court rolls of the said manor any entry of a surrender of lands being part and parcel of the said manor, and held by copy of court roll thereof, to such uses as should be declared by the last will and testament of the person making such surrender, had ever been made, but that since the passing of the said act, lands being part and parcel of the said manor, and held by copy of court roll thereof, have been surrendered to such uses as should be declared by the will and testament of the persons making such surrender.

That the said *H. Edmunds* did not at any time surrender the tenements in the first count of the within declaration mentioned: and they further say, that the said *H. Edmunds* died on the 24th of *December* 1815, and after the passing of the said act of parliament, without having altered or revoked his said will, entitled to the premises in the first count of the within declaration mentioned, for the estate hereinbefore-mentioned, leaving a widow, the said *Joan Edmunds*, and three sons him surviving, and that the said *W. Edmunds* and *J. Edmunds* are the two younger sons of the said *H. Edmunds*.

That the lands being part and parcel of the said manor, and held by copy of court roll thereof, descend according to the custom of gavelkind (*a*), to all the sons of the tenant dying seised thereof. And that at a court baron and customary court held in and for the said manor on the 28th *February* 1821, the said *Joan*

(*a*) See, however, 34 & 35 *H.* 8. c. 36, s. 91, and s. 128, abolishing the custom of gavelkind in *Wales* and *Monmouthshire*.

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Edmunds was, according to the custom of the said manor, admitted tenant as well to the premises in the first count of the within declaration mentioned, as to all other lands being part and parcel of the said manor and held by copy of court roll thereof, of which the said *H. Edmunds* died seised, or to which he was entitled to hold all the premises, unto her the said *Joan Edmunds*, her heirs and assigns for ever; and that the entry of such admittance appearing upon the court rolls of the said manor is as follows, that is to say:

"Manor of *Abercarne*. } The court baron and customary court of *George Maule*, *Joseph Kaye*, and *John Llewellyn*, esqrs. lords of the said manor, held in and for the said manor on *Wednesday* the 28th *February* 1821, by and before me *David Williams*, gentleman, steward of the said manor, and *William Edmunds* and *Philip David*, homagers then and there present.

"To the court came *Joan Edmunds* of the parish of *Mynyddyslogan*, in the county of *Monmouth*, widow, and prayed to be admitted tenant of and to all that one parcel of land called &c. [here followed a description of the premises,] and the reversion and reversions, remainder and remainders thereof. And the said lords by their said steward to the said *Joan Edmunds* hath granted seisin thereof, to have and to hold the said premises with their appurtenants unto the said *Joan Edmunds*, her customary heirs and assigns for ever, according to the custom of the said manor, by and under the yearly rent of £——, and other rents and services therefore anciently due and of right accustomed to be paid and performed; and the said *Joan Edmunds* hath given to the lords as a fine for such her estate, and entry in the said premises——, and hath done her fealty to the lords, and is admitted tenant thereof."

And that at the said last-mentioned court baron and customary court, the said *Joan Edmunds*, so admitted tenant of the said premises in the within-written declaration mentioned, did surrender the same into the hands of the lord of the said manor, according to the custom thereof, to the use of one *H. Mostyn*, his customary heirs and assigns, for ever; to whom the same lords did at the same court grant admittance thereof,

but whether or not upon the whole matters aforesaid, by the jurors aforesaid, in form aforesaid found, the said defendants are guilty of the trespass and ejectment in the within mentioned first count, the jurors aforesaid are altogether ignorant, and therefore they pray the advice of the court of our lord the king, before the barons of his Exchequer; and if upon the whole matter aforesaid, it shall seem to the court that the said defendants are guilty of the trespass and ejectment last mentioned, then the jurors aforesaid upon their oath aforesaid say, that the defendants are guilty thereof in manner and form as the said *John Doe* hath within thereof complained against them; and in that case they assess the damages of the said *John Doe* on occasion of the said trespass and ejectment, besides his costs and charges by him about his suit in this behalf expended to one shilling, and for these costs and charges to 40*s*., but if upon the whole matters aforesaid shall seem to the said court that the said defendants are not guilty of the trespass and ejectment in the said first count mentioned, then the said jurors aforesaid upon their oath aforesaid say, that the said defendants are not guilty thereof, &c. &c.

This case was argued in last term by

R. V. Richards for the lessors of the plaintiff. There are three points; first, the lands in question not being held at the will of the lord, are not copyholds; secondly, if they were so, they are not within 55 *G*. 3. c. 192., as the special verdict does not find any custom to surrender to uses declared by the will; and thirdly, the copyhold estate did not pass by the will. On the first point, lands are not copyhold unless held at the will of the lord, though of copyhold tenure in other respects. *Litt*. sect. 73, *Smith* v. *Page*(*a*). *Hargrave*

(*a*) Comberbach, 387.

was, that copyholders, at the passir
donis (*a*), were only tenants at will of
no remedy against him for ouster, ex
Rowden v. *Malster* (*b*), *Rogers* v.
Brown's case (*d*), are also in point.
Oldfield (*e*), a plaintiff brought cas
common, and declared that he was se
in one messuage and ten acres of lan
tenants in *N.* " parcel of the manor
by copy of court roll of that manor
tenant in fee simple, according to t
same manor." The plaintiff had a
ment on which was finally supported
Lord *Holt* declaring, " that it shoul
that the tenements were held at th
according to the custom of the mar
appear fully to have been copyhold, l
copyhold, it is impossible this finding
Gale v. *Noble* (*f*), it was held that
manor in *Wilts*, and of the *Duchy*
still passed by surrender and copy
customary freehold only, and not
not granted at the will of the lord, b
to the custom of the manor. [*A*
Brook's Abridgment, tit. Tenant pe
Rol. &c. pl. 22, and 1 *Blackstone's L*

In *Gilbert's Treatise on Tenures*, p. 157, it is laid down that a copyholder cannot transfer his estate but by surrender, because "he has only an estate at will." Serjt. *Williams*, in his note to 1 *Saund.* 348, says, the words "at the will of the lord" are essential, for it is fatal to say that the lands were demisable by copy of the rolls of the court, without adding them, and if they are omitted the estate will be intended to be in fee at common law. Estates of this nature existing in the north of *England*, under the name of tenant right tenure, are neither customary nor freehold, but were considered, in *Doe* d. *Reay* v. *Huntington* (*a*), as falling under the same general consideration as copyholds for some purposes, though in *Burrell* v. *Dodd* (*b*), decided in the same year in the court of Common Pleas, such lands were decided to be neither customary freeholds nor copyholds, but of a peculiar description. Now the statute 55 *G.* 3. c. 192. only applies to copyholds.

Secondly, no custom is found to exist in this manor, for surrendering to such uses as should be declared by will; so that even if the lands were copyhold the right to them is not affected by stat. 55 *G.* 3. c. 192., nor is that devise rendered valid which would not have been so before that act, even had a surrender been made. The act recites, that whereas *by the customs of certain manors*, copyhold estates of such manors pass by the last will and testament of the copyhold tenants thereof, declaring the uses of surrenders made for that purpose; and that much inconvenience has arisen from the necessity of making such surrenders, and enacts, that in all cases where *by the custom of any manor* in *England* or *Ireland* any copyhold tenant of such manor may by his or her last will and testament dispose of or appoint his

(*a*) 4 East, 270.

(*b*) 3 B. & P. 378.

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or her copyhold tenements, the same having been surrendered to such uses as should be declared by such last will and testament, every disposition or change made or to be made by any such last will and testament, by any person who shall die after the passing of this act, of any such copyhold tenements, or of any right, title, or interest in or to the same, shall be as valid and effectual to all intents and purposes, although no surrender shall have been made to the use of the last will and testament of such person, as the same would have been if a surrender had been made to the use of such will. There is a proviso in sect. 3. against rendering valid any devise or disposition of any copyhold lands, &c. or of any right, title, or interest in or to any copyhold lands, &c. which would be invalid or ineffectual, if a surrender had been made to the use of the last will and testament of the person attempting to dispose of the same by will." Though Lord *Thurlow* is reported to have declared, in *Pike* v. *White* (a), that it was totally impossible to say that a copyhold surrendered to the use of a will, should not pass thereby, and that a custom that it should not, was bad; that opinion has been much questioned (b), and was thought by Lord *Redesdale* not to go further than laying down, that in that case the surrender should be supplied. [*Parke* B. You may take the special verdict as finding affirmatively that there is in the manor no custom of surrendering to the use of the will. The same learned baron, on the third report of the real property commissioners, p. 20, being mentioned, said it it was no authority. *Alderson* B. The statute itself appears in terms to contemplate some cases to which it would not apply.]

(a) 3 Brown's Chan. Cas. 286.

(b) See Belt's note to 3 Brown's Chan. Cas. 288; 1 Evans's Collection of Statutes, 475.

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Thirdly, this will has no words sufficient to pass the copyhold estate. Though *Doe* d. *Clarke* v. *Ludlam* (*a*), decided that since the statute a copyhold will pass under a general devise of real property, *Doe* d. *Smith* v. *Bird* (*b*) is contrary. [*Parke* B. The judges, who decided the last case cited, had no intention that it should interfere with the prior decision, and considered the point very closely. Besides, in *Doe* v. *Bird* the will was made before the statute.]

Maule for the defendants. As to the first point, these lands are held "according to the custom of the manor," which words are synonymous with and include "according to the will of the lord." Then they are copyhold, so as to pass by the will, unless prevented by something peculiar in this manor. Now this tenure, if wholly or in part copyhold, in its nature and attributes, will be so, whether so described in the court rolls or not. *Blackstone* in his Tract, entitled Considerations on Copyholders, p. 145—147, considers the terms "customary freehold or freeholders," as put in opposition to "*common* copyhold or copyholders," or a mere copyholder; but still holds them to be copyholds of a free and privileged nature, and that it would be absurd to say, that lands holden by copy of court roll are not copyholds, in any sense. He says, (p. 159) that however the lawyers may at times have denominated these tenures a sort of base species of freehold, in contradistinction to mere copyholds, yet the law in the main regards them as being properly copyhold, and not freehold tenures, else they would not have subsisted to this day, but would have been abolished by 12 *Car.* 2. c. 24. and reduced to free and common socage. *Scriven*, after citing the above, adds, "there is a difference in

(*a*) 7 Bing. 275; 2 M. & Scott, 48. (*b*) 5 B. & Adol. 695.

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the mode of pleading between pure copyholds, and those of a privileged nature, denominated customary freeholds, arising principally out of the circumstance of the former being held, not only secundum consuetudinem manerii, but also, ad voluntatem domini. whereas the latter are held according to the custom of the manor, but not at the lord's will. With this exception, however, there would appear to be no grounds of distinction between ordinary and privileged copyholds, when the latter are held "by copy of court roll," and pass by surrender and admittance, although not held "at the will of the lord (*a*)." At all events, if the lands are for any purposes copyholds, they are such within stat. 55 *G.* 3. c. 192, which is to be liberally construed as a beneficial act, its object being to supply a surrender in cases where land could not pass by will without surrender, but would pass by will and surrender.

Secondly, the special verdict finds nothing as to any custom of devising within the manor, so that nothing appears to prevent these lands passing by the will. Had it found a custom that lands should not be surrendered to the use of a will, Lord *Thurlow*'s authority in *Pike* v. *White* shows that it would be bad. That decision is referred to by *Watkins* (*b*), who says, that a copyholder may surrender to such uses as he shall by will appoint, without a special custom for that purpose; and, indeed, if a special custom were alleged to restrain him from doing so, it could not be supported. In *Church* v. *Mundy* (*c*), Lord *Eldon* approved Lord *Thurlow*'s opinion, saying: "The court would hold that there might be a surrender to the use of a

(*a*) And see 2 Bla. Com. 100.

(*b*) Treatise on Copyholds, Vol. I. 122.

(*c*) 15 Vesey, 404.

will, though no instance could be found on the records of the manor, or if there could be no such custom, there must be some mode of disposition by deed, as in the case of customary freeholds, the want of which this court would supply." But here no such negative custom is found in fact(*a*), and the mere absence from the court roll of any instance of such a surrender, does not show the existence of a custom to prevent its being made, and the land would pass by devise under the general law of copyholds, no custom to the contrary appearing. No special custom is requisite to the use of a will, but it is incident to the general custom of tenures by surrender and admittance, that the admittee may be designated by a will. This case is more analogous to an appointment to uses, than a devise by will(*b*), as, before the statute of wills, a freeholder was enabled to devise by making a feoffment to uses. Then as these lands pass by surrender and admittance, and no custom is found restraining the general power of fixing the party to be admitted, he may be pointed out by will of the surrenderor. Then the statute supplies the surrender, so that the lands being copyholds within the statute, so as to be capable of passing by will and surrender, they pass by the will also.

Cur. adv. vult.

Lord ABINGER C. B. delivered the judgment of the court.—This case was argued before us last term, on a special verdict. The question was upon the statute of 55 *G.* 3. c. 103, whether or not, by virtue of that statute, the estate in question, which had been devised by the testator, passed, the copyhold estate not having been surrendered to the use of the testator's will. On the special verdict two points were made.

(*a*) See the finding, *ante*, p. 904. (*b*) See 2 Scriven, 299, 293.

that this copyhold estate, not held a
lord, may not in strict legal languag
yet all the text writers, especially Si
and my Lord *Coke*, treat these estate
a like species, though distinguished i
characters; and therefore it is sufficie
general word "copyhold," which is
55 *G.* 3. must be considered to em
that description.

The next point was, that it did no
custom of this manor, copyhold estates
passed by surrender and admittance, w
will; and it was argued that the stat
cation to any species of copyhold est
not devisable by will. The special ve
the estates in question, with all othe
like nature, passed by surrender and
does not state any negative of a custon
Therefore, the question arises, which
ingeniously and fully discussed, whe
must take the special verdict to be, th
estate, within a manor of this descript
by will. Now, if it had been necessar
tively or negatively in distinct terms, w
existed to pass copyholds by will in

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is sufficient on this special verdict to warrant our judgment, although it does not contain any negative finding against the right claimed by the devisee. It may be observed, that the authority of Lord *Thurlow* in the case of *Pike* v. *White* (*a*), if taken to the full extent, would be a warrant for saying, that in all cases a negative custom of that sort would be bad; but the court is not prepared to go that length. At the same time it must be observed, that the authority of Lord *Thurlow* in that case, though referred to by other judges, has never been questioned, nor has his dictum been overruled; but Lord *Thurlow*'s proposition contains two points in respect of the case then before him; the case neither found that there was or was not a custom; and Lord *Thurlow* laid it down, that it was impossible to say that a copyhold surrendered to the use of a will should not pass thereby, though there was no special custom prevailing in the manor to devise lands; but then he added, that if a negative custom had been found that lands should not be surrendered to the use of a will, it would have been bad. Now, the question which has been made on Lord *Thurlow*'s judgment by two or three gentlemen, who have devoted much time to the nature of copyhold tenures, has never gone beyond this proposition, namely, whether where the custom has been found in the negative to exist in a manor, that copyholds should not pass by will, Lord *Thurlow* would have been right in saying, that that custom would be unlawful; but nobody has ever questioned the first part of the proposition, that where it did not appear in the negative form, the estate did pass by surrender and admittance to the use of a will. It appears to us on principle, and upon the authority of this case, and so far nobody has questioned Lord

(*a*) 3 Brown's Chancery Cases, 286.

or that he should surrender a copyh
should declare a person whom he wis
mitted by his will. There is nothing
verdict, to show what particular form
intention or the use of his surrender is
custom of the manor. There is nothin
he should not declare by deed or note i
will, or by parol, the person who was
on surrender; and therefore, as the ve
finds that by the custom of the manor,
pass by surrender and admittance, and
tive the custom that surrenders may
the will, we are of opinion that there
justify the court in finding, in this case,
has application to the case in questio
though no surrender was actually mad
render had been made, the copyhold es
passed by will, independently of the s
statute applies to make the fact of a
cessary to support a devise by will of a
where, by the custom of a manor, a c
was devisable by will, on a surrender bei
therefore, think that on this special
warranted in saying, that the custom i
tablished in law, as well as in fact, to a
to it; and we are of opinion, therefore,

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The KING *against* FAULKNER.

A town commissioner of bankruptcy, appointed under 1 & 2 *W.* 4. c. 56. and sitting alone, had no power (before 5 & 6 *W.* 4. c. 29. s. 25.) to fine or commit for contempt. *Semble*, that where the question of the legality of a fine imposed for contempt of court comes before the Court of Exchequer on motion, the court will not inquire into the nature of the alleged contempt.

THE defendant was appointed town agent under a fiat in a country bankruptcy sued out by *Owens*, an attorney living at *Holyhead*. The official assignee permitted *Jones*, the petitioning creditor, to take the goods of the bankrupt at a certain sum. The defendant and his partners, as solicitors for *Jones*, prepared the deed of assignment to him, and charged the expense of it to the estate. On discussion before one of the commissioners of bankruptcy, whether this expense should not be discharged by the petitioning creditor himself as purchaser, without diminishing the bankrupt's estate *pro tanto*, the commissioner, acting in the exercise of his judicial functions, decided, that it was not a proper charge on the bankrupt's estate. The defendant wrote a letter to the commissioner, impugning his conduct in making certain observations which had accompanied his decision. The letter was delivered to the commissioner, while sitting as such, whereupon he afterwards summoned the defendant before him as a witness. He was sworn, and being asked whether he had written and sent the letter in question, answered that he had. The commissioner then fined the defendant for having so done, declaring that his act was a contempt towards him in his character of commissioner of the court of bankruptcy. An estreat of the fine having been removed into this court, Sir *W. Follett* obtained a rule, calling on the Attorney General to show cause why the fine should not be set aside and the money restored.

Sir *John Campbell* Attorney General, and *R. V. Richards* showed cause. The question is, whether a commissioner, sitting in bankruptcy, has power to

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fine for contempt? For if he had, then his court not being an inferior court, as the court leet was in *Rex* v. *Mosley* (*a*), no question can be entertained by any other court, as to the nature of the alleged contempt, or respecting the manner in which the power was exercised. Now, the power in question was conferred on them by 1 & 2 *W.* 4. c. 56. [*Parke* B. mentioned *Griesly's case* (*b*). Before that statute, the contempt of a commissioner of bankrupt was a contempt of the great seal, only tangible before the chancellor.] There is no distinction between the power to fine, which is here claimed, and that to imprison for a contempt; but the commissioner may be able to fine for a contempt, though not to imprison a witness for prevarication. The intent of 1 & 2 *W.* 4. c. 56., was to erect a court of bankruptcy, consisting of three divisions or branches which never meet, but, as in the court of session in *Scotland*, sit in separate places, *viz.* the court of review, the subdivision courts, and the commissioners acting singly; so that if a commissioner, setting singly, has no power to fine or imprison for a contempt, a court of review or of subdivision cannot. Now the first section of the act constituted the court of bankruptcy a court of law and equity, and enacted, "that it shall, together with *every judge and commissioner thereof*, have, use, and exercise all the rights, incidents, and privileges of a court of record or judge of a court of record, and all other rights, incidents, and privileges, as fully, to all intents and purposes, as the same are used, exercised, and enjoyed by any of his majesty's courts of law or judges at *Westminster*." Then is not every judge and every commissioner acting in their respective situations, a judge of a court of re-

(*a*) 5 Nev. & Man. 261. And see Lord *Tenterden*'s observations in *Rex* v. *Davison*, 4 B. & Ald. 334; also Vin. Ab. tit. Contempt (A.) pl. 17. The attorney general waived the objection that there was no constat of the entreat.

(*b*) 8 Rep. 38.

rd, with the same power as a single judge of the court King's Bench, sitting in the bail court under 57 *G.* 3. 11., or judges of Common Pleas or Exchequer sitting ıgly in their respective courts under 11 *G.* 4. and 1 *W.* c. 70. s. 1.? [*Parke* B. No doubt, as they act under ıtute.] Any judge of a court of *Westminster Hall,* ting at *nisi prius,* being a court of record, has an unıubted power to fine and commit for a contempt; ex v. *Clement* (*a*), *Rex* v. *Davison* (*b*). So a judge ting at chambers, in the exercise of judicial funcıns under any statute, as granting a habeas corpus, in other duties imposed on him there by state, would undoubtedly have similar power as at nisi ius, if he then clearly constituted a court of record. he commissioner sitting alone constituted a court, ıd if so, a court of record, as appears by sect. 1. ow sect. 2. makes the three judges form a court of view, that is contended not to be a court of rerd, but can only be such under words in sect. 1, ually applicable to a commissioner sitting alone. ord *Abinger* C. B. Section 1. gives every judge and mmissioner all the rights and incidents of a court of cord, not making each judge or commissioner a court himself, but giving him the same power as a judge a court of record would have. The whole body of dges and commissioners seems to constitute the court of bankruptcy" mentioned in section 1., but it n never exercise its functions in a consolidated shape meeting, sitting, or acting together.] It is contended, ıat each subdivision court and each commissioner, tting singly, is a court of record. [*Alderson* B. Why oes sect. 4. give the Court of Review the particular owers which it does, if it were a court of record by e first section?] It may be said that, as by sect. 7., e power of the commissioners to commit for not duly

(*a*) 4 B. & Ald. 218; *S. C.* 11 Price, 68.
(*b*) 4 B. & Ald. 329.

of protecting persons acting singly in
from the abuse and disrespect of pers
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missioner of bankrupt may be protected
being laid against him, by being *a* judg
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Abinger C. B. The "rights, incidents, a
mentioned in sect. 1., are not incident to
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in the court only. Thus at *nisi prius* it
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Richards mentioned *Ex parte Lampon, in*
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omitted.)

Sir *William Follett*, *Wightman* and
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if done out of his court. [*Parke* B. W
examining this record, and the single que
is, whether a commissioner of bankrupt, si
fine for contempt.] No court could con

the letter sent by this defendant to the commissioner, however injurious to the latter, for of them he is the judge. *Parke* B. In *Rex* v. *Almon*, as found in Mr. Justice *Wilmot*'s Notes and Opinions, p. 243, that learned judge was of opinion, that a libel on a judge for acts done by him in his judicial character, was a contempt of the court, though there might be no actual obstruction of justice. Nor is it essential that the matter complained of as a contempt, should be an obstruction of the course of justice; occurring in the face of the court, *Rex* v. *Clement* (*a*). *Alderson* B. Can a letter of abuse, sent to a judge concerning a judgment he has before delivered, be a contempt in the nature of obstructing the course of justice?]

To come to the question on this act, whether a commissioner of bankrupt, sitting alone, has a power to commit at all. Before this act, the several commissioners sitting together had not; and sect. 7. of this act has stripped the commissioners sitting alone of the power to commit, except to a subdivision court. The utmost which sect. 1. can by possibility effect, is to make each commissioner stand in the same condition as a judge of a court of record at *Westminster*. But it is apprehended, that an individual judge of those courts has no such power. Thus attachments do not issue for disobedience of a judge's order, made by him at chambers, till it is made a rule of this court. [*Parke* B. The power of a judge at chambers is discussed in *Wilkes*'s case, cited in Mr. Justice *Wilmot*'s account of *Rex* v. *Almon*. A judge who acts at chambers acts by authority of the court (*b*), and it would be proper that the court should take notice of any contempt offered to him

(*a*) 4 B. & Ald. 218.

(*b*) See per *Tindal* C. J. *Doe* d. *Prescott* v. *Roe*, 9 Bing. 104; 2 M. & Scott, 119. Also per *Bayley* B. *Hughes* v. *Brand*, 2 Dowl. P. C. 131. Also 1 Camp. 392; 3 id. 348.

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there. Section 1. intended to protect commissioners from the liability to actions, to which they were before exposed, just as a judge who granted a bench warrant at chambers, would not be liable to an action for false imprisonment. But if that be so, the Court of Review itself would not have power to fine or imprison for contempt.] At all events a commissioner has no such power, and cannot commit a person examined before him except to the messenger's custody, in order to bring him before a subdivision court, to be convened within three days. [*Alderson* B. A single commissioner has now the powers of one of the old lists of commissioners, except that of committal, which may now only be exercised by three assembled in a subdivision court. So the old acts required the commitment to be under the hands of three commissioners.] The very cases so to be referred to courts of subdivision, are cases of contempts. The utmost power the present commissioners have in cases of contempts in the face of their court, is to have the offending party removed and taken before a magistrate for the disturbance. That is by analogy to the power given to the old commissioners of bankrupt by 1 & 2 *G.* 4. c. 115. s. 21.

Lord ABINGER C. B.—If I felt any doubt on this case, I should have been very much disposed to take some time to consider it, both from the importance of the question, and the respect which I entertain for the gentleman who imposed the fine. He has acted upon a construction of the act of parliament which is very pardonable, if it be wrong; for it must be owned that there are some obscurities in it. For some time during this discussion, I hesitated very much as to the proper conclusion to come to upon it; but I now entertain a clear opinion, and feel no doubt that Mr. *Fane* has in this case exercised a power which that act does

not authorize him in exercising. Now the argument is, that the first clause of the act, which constitutes the Court of Bankruptcy, makes the court, with every judge and commissioner thereof, a court of record, possessing all the incidents, rights, and privileges of a court of record, or of a judge of a court of record; and it is contended that the commissioner, every time he exercises any function with which the act invests him, is sitting as a judge of a court of record; but that is a construction by inference only of an act of parliament that pretty clearly defines what the powers of the Court of Review, the subdivision courts, and the commissioners are: and goes so far in some cases, where this very subject of contempt is mentioned, as to define what shall be done in that particular case. I think so important a power, which requires the greatest nicety in its exercise, should not be vested merely by an inferential construction of an act of parliament, because in a general clause it invests him with the character of a judge of record. It is sufficient to say, if we are bound to find a meaning for every word in that clause, that the incidents and rights given to the judge of record, were meant to protect him from being liable to the consequences of an action for any act he might do in exercising his functions; but it would not follow from that, that the legislature intended to give him all the powers of a judge of a court of record to the full extent; and that the act did not mean to do so is plain, because it has not contented itself with leaving his supposed powers in doubt, but goes on in many clauses to define what those powers shall be. It is sufficient, I think, therefore, to say that the clause in the act of parliament which creates a court, which in no part of the subsequent clauses seems to have any functions or existence whatever, namely, the Court of Bankruptcy, if it has any meaning at all, means only to give to any

A judge of the court of King's Bench
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the power of committing for a contempt. But to go further, and looking at the general intention of the act, it appears to be the object of it to establish a Court of Review consisting of four judges, to make six commissioners, of whom three will form a court of subdivision, and the other three another court of subdivision: and that the Court of Review shall have all the jurisdiction that the Court of Chancery before had in bankruptcy, and that the other courts of subdivision shall have all the authority and power that the commissioners of bankruptcy had before. Then comes a clause for the purpose of giving more facility to the act in operation, to enable the commissioners to exercise the same functions that commissioners of bankruptcy did before. Three commissioners of bankruptcy were by the old law necessary to constitute a proper tribunal. Three commissioners now make the court of subdivision; but it occurred to the framers of this act, that it would be convenient in many cases, as the business multiplied on them, to allow one commissioner to do many of the official or ministerial acts; and the act therefore provided that a commissioner should have the same power that the commissioners of bankruptcy possessed under the act then in existence, the same powers and authorities that were limited and defined by previous acts of parliament; and undoubtedly they did not embrace the authority now in question, of committing for a contempt; but any obstruction or contempt of the commissioners, was punishable by an attachment from the Court of Chancery, on proper complaint made to the Lord Chancellor. It appears to me that the Court of Review may now exercise, under the second clause of this act, all the powers which the Court of Chancery had exercised before, in any complaint made from the commissioners, and there is no difficulty, therefore, for the commissioner, if, while he is acting in his individual

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missioner in calling the party before the Court of Review; I think the commissioner, sitting separately, had no right to exercise the authority which he has done, and that the rule must be made absolute.

PARKE B. had left the court to attend chambers.

BOLLAND B.—I am of the same opinion, and after the observations that have been made by my Lord Chief Baron, in the fuller view he has taken of this case, I should have contented myself with only expressing my acquiescence in his judgment; but as it is a question of novelty and importance, I will point out the reasons why I agree with him in all that he has said upon the construction he has put upon this act of parliament.

It appears, that in order to carry into operation the purposes of this act, it was thought right to select ten persons to carry such measure into execution; and in order to facilitate the operation and working of the act, these ten persons are afterwards subdivided, and to them are given separate and distinct offices to perform. It does not appear at all, although the ten are formed into a court, that they have in practice ever sat as such court as is constituted by the act; but to that court, and every judge and every commissioner of that court, is given distinctively the powers that belong to his majesty's courts of law, or judges at *Westminster*, while sitting in matters of bankruptcy. By the second section, a Court of Review is formed. By the third section, it is provided that the Court of Review is to hear certain matters that are to be brought before it; and it is, by the fourth section, enabled to order issues to be tried. By the sixth section, the six commissioners are divided into two courts, which are to be called the Courts of Subdivision. Now these are courts that are

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to exercise their functions under this act; but in order to facilitate its working, and to carry it more fully into operation, the legislature has by the seventh section provided, that any one commissioner may sit to perform the functions that were performed before by the commissioners of bankruptcy under the old law. Every one who is familiar with the manner in which the business was done by the commissioners under the old act, must know, that from the very great press of business at times, it was absolutely necessary, after the commission was opened, to send one of their body to sit apart from them, (as a judge of the other court sits apart now from us), to examine the witnesses and take the proofs of debts, and to facilitate the business in operation.

In order, therefore, to throw a protection round such person sitting alone, the 7th clause gives to one commissioner all the powers that were possessed by the three commissioners under the old act of parliament; but it goes on further—it goes on to take from him that power which the three commissioners under the old act of parliament had—namely, the power of committing in cases of contempt; and it says, that no single commissioner shall have power to commit any bankrupt or other person examined before him, otherwise than to the care and custody of a messenger or other officer of the said court, to be by him detained in his custody, and brought up before a subdivision court or the Court of Review within three days after such confinement; clearly showing that the legislature meant to take from these gentlemen, when they were sitting in their individual character of commissioner, and sitting alone, every such power as had been possessed by the three commissioners under the old act. Then by the 10th section I think it is perfectly clear, that in matters of contempt, the legislature has shown, that it did not intend to invest a single commissioner with the power

that is now contended for. The 10th section provides, that an attorney who practices in that court, not being an attorney or solicitor duly admitted, shall be guilty of contempt; but it says, that the attorney shall only be liable to punishment on complaint thereof made to the Court of Review. If it is a contempt, why is he not to be punished by a single commissioner sitting alone, if he was intended to have a power of committing for contempt? On these grounds I perfectly agree with what has been said by my Lord Chief Baron. I will go further, and say that I had no doubt from the first, when I heard this application made to the court, that the fine could not be sustained, and I am the more confirmed in the opinion which I then formed by what I have heard to-day.

ALDERSON B.—I am of the same opinion, that in this case the rule ought to be made absolute, and that Mr. *Fane* had no jurisdiction to commit for contempt. I quite agree with the law as laid down by the Attorney General, that if there be a power on his part to commit for the contempt, the nature of the contempt is not examinable before this court. It then becomes important to consider whether so large a power is given by the legislature in this case; and it appears to me, that such a power is not given by the act in question to one commissioner sitting alone. The main stress of the argument in support of it, rests on the first clause of the act of parliament. It seems to me, that the first clause may have a very reasonable construction, without giving to the commissioner sitting alone the power contended for on the present occasion. After constituting the court, the act of parliament proceeds to state, that "the same court shall be and constitute a court of law and equity, and shall, together with every judge and commissioner thereof, have, use, and exercise all the rights,

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incidents, and privileges of a court of record, and all other rights, incidents, and privileges, as fully, to all intents and purposes, as the same are used, exercised, and enjoyed by any of his majesty's courts of law or judges at *Westminster*." If you take the words to the letter, it would give to every commissioner the power and privilege of a court of record, as fully as they are exercised by the courts of record at *Westminster*. I think it would require very strong words to induce the court to come to that conclusion. The words of the act may have a very sensible construction, by being construed distributively, that is to say, by giving to courts of bankruptcy the rights, incidents, and privileges that belong to a judge of a court of record. No one of the rights, privileges, and incidents of a judge of a court of record, necessarily carries with it the power of committing for contempt; and, therefore, it seems to me that the first clause, by being construed distributively, may have a perfectly sensible construction, being intended to constitute the court as a court of record, with all its rights, incidents, and privileges; that is, having its records treated as all other records of another court, and each of its judges having the same protection and privileges which judges of the courts of record have, of not being answerable, in the shape of actions, for any acts which they may have done in their judicial capacity and character. That will supply a clear and sensible construction without giving this irresponsible power, and it seems to me, that it is much more consistent with the other clauses of the act, to which the attention of the court has been called. For instance, it appears much more consistent with the 4th section, than the construction put on it by the Attorney General would be. You are to suppose that each of the judges and each of the commissioners has the full power of a court of record, and yet we find that the Court of Re-

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by any judge or commissioner as afore

1835.

JOHN REAY, JOHN REAY the Younger, and HENRY REAY, *against* WALTER RICHARDSON.

Assumpsit on bills of exchange. Plea that the defendant was also indebted to Sir *W. R.* and divers other persons, in divers other sums of money, of which the plaintiffs had notice, and that afterwards and before the said bills became due, and whilst he was so indebted to the said Sir *W. R.*, and the said other persons, he, the defendant, became insolvent and unable to pay his debts. That thereupon, in consideration of the premises, and with the view and intention of inducing, and of enabling the said defendant to induce the other creditors of the defendant, to accept and receive a composition of one moiety of their debts, and in consideration that the defendant would pay to them, the plaintiffs, half the amount of the said bills when the same respectively became due, the said plaintiffs agreed to accept a composition of one half the amount of the bills as they became due; and that afterwards, the said agreement so made and entered into by the plaintiffs, was by the defendant, with their knowledge and by their direction, represented and made known to the said Sir *W. R.*, so being such creditor as aforesaid, who thereupon, in consideration of the premises, and in faith of that agreement, was lured and induced to accept that composition; and that he, the said Sir *W. R.*, had not at any time since recovered or received, or sought to recover or receive any greater or other sum than half the amount of his said debts:—Held, on motion for judgment for plaintiffs, notwithstanding a verdict for defendant, that this plea was bad, for not showing that all, or at least that the majority of the defendant's creditors had assented to the arrangement, and agreed to take the composition.

The terms of the agreement for the composition, were contained in a letter from one of the plaintiffs; the court admitted proof of a previous conversation of the witness with the plaintiffs and defendant, in which the plaintiffs inquired what the other creditors were likely to do, as evidence of the motive which induced him to write the letter, and of the object for which the agreement was projected to be entered into.

ASSUMPSIT on three bills of exchange, by the drawers and payees against the acceptor. Plea that before the making of the agreement thereinafter mentioned, the plaintiffs had drawn four several bills of exchange (setting them out) upon the defendant, which he had accepted; that the plaintiffs had also drawn, and the defendant had accepted the bills of exchange mentioned in the declaration; that the plaintiffs had also drawn four other bills of exchange (setting them out) upon the defendant, which were accepted by him. The plea then alleged, that heretofore, and before and at the time of the making of the said agreement between the plaintiffs and the defendant, to wit, on the day and year next hereinafter mentioned, he the said defendant was also indebted to one Sir *W. H. Richardson*, knight, in a very large sum of money, to wit, the sum of 2450*l.*, and also to divers other persons

[This decision occasioned section 25. of the stat. 5 &
passed 21st *August* 1835, and enacted " that the
and the said *several Subdivision Courts*, shall hencef
deemed and taken, from and after the passing of the
have been courts of record, and shall and may have
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such at the time of passing the before recited act; and
use, and exercise all the powers, rights, incidents, and
of record, as fully as the same are used, exercised, a
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by any judge or commissioner as aforesaid to the said

1835.

N REAY, JOHN REAY the Younger, and HENRY REAY, *against* WALTER RICHARDSON.

SSUMPSIT on three bills of exchange, by the drawers and payees against the acceptor. Plea t before the making of the agreement thereinafter ntioned, the plaintiffs had drawn four several bills exchange (setting them out) upon the defendant, ch he had accepted; that the plaintiffs had also wn, and the defendant had accepted the bills of hange mentioned in the declaration; that the plain- had also drawn four other bills of exchange (set- them out) upon the defendant, which were accepted him. The plea then alleged, that heretofore, and ore and at the time of the making of the said agree- nt between the plaintiffs and the defendant, to wit, the day and year next hereinafter mentioned, he said defendant was also indebted to one Sir *W. H.* *hardson*, knight, in a very large sum of money, to the sum of 2450*l.*, and also to divers other persons

Assumpsit on bills of exchange. Plea that the defendant was also indebted to Sir *W. R.* and divers other persons, in divers other sums of money, of which the plaintiffs had notice, and that afterwards and before the said bills became due, and whilst he was so indebted to the said Sir *W. R.*, and the said other persons, he, the defendant, became insolvent and unable to pay his

s. That thereupon, in consideration of the premises, and with the view and ntion of inducing, and of enabling the said defendant to induce the other credi- of the defendant, to accept and receive a composition of one moiety of their s, and in consideration that the defendant would pay to them, the plaintiffs, half amount of the said bills when the same respectively became due, the said plain- agreed to accept a composition of one half the amount of the bills as they me due; and that afterwards, the said agreement so made and entered into by plaintiffs, was by the defendant, with their knowledge and by their direction, esented and made known to the said Sir *W. R.*, so being such creditor as said, who thereupon, in consideration of the premises, and in faith of that ement, was lured and induced to accept that composition; and that he, the said *W. R.*, had not at any time since recovered or received, or sought to recover or ive any greater or other sum than half the amount of his said debts:—Held, on ion for judgment for plaintiffs, notwithstanding a verdict for defendant, that this was bad, for not showing that all, or at least that the majority of the defendant's itors had assented to the arrangement, and agreed to take the composition.

he terms of the agreement for the composition, were contained in a letter from of the plaintiffs; the court admitted proof of a previous conversation of the ess with the plaintiffs and defendant, in which the plaintiffs inquired what the r creditors were likely to do, as evidence of the motive which induced him to e the letter, and of the object for which the agreement was projected to be en- d into.

this plea mentioned, had become du
according to the tenor and effect ther
the said defendant was so indebted t
W. H. Richardson, and the said other
after mentioned, to wit, on &c., the said
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of the said several and respective bills
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same debts respectively, and also in co
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same bills of exchange respectively, and of the sum of money in which the defendant was or would become indebted to the said plaintiffs by reason thereof; and the said defendant, in consideration of the premises, then agreed to pay the said plaintiffs one-half of the amounts of their several respective bills of exchange in manner aforesaid. And that afterwards, and before any of the said bills of exchange became payable, to wit, on the day and year aforesaid, the said agreement so made and entered into by the said plaintiffs with the said defendant as aforesaid, was by the said defendant, with the knowledge and consent and by the direction of the said plaintiffs, represented and made known to a certain other person, then being a creditor of the said defendant, to wit, to the said Sir *W. H. Richardson*, so being such creditor as aforesaid, and thereupon, in consideration of the premises and upon the faith of the said plaintiffs having made and entered into such agreement with the said defendant as aforesaid, he the said Sir *W. H. Richardson*, so being such creditor as aforesaid, was lured and induced to agree, and did then agree with the defendant to accept and receive payment of one-half of the said debt so due and owing to him the said Sir *W. H. Richardson* as aforesaid, in full satisfaction and discharge of the same debt, and the defendant, in consideration thereof, then promised the said Sir *W. H. Richardson* to pay to him such one-half his said debt when thereunto afterwards requested. And the said Sir *W. H. Richardson*, by reason of the premises, hath not at any time since recovered or received, or sought to recover or receive of or from the defendant any greater or other sum than one-half of the amount of his said debt; of all which premises the plaintiffs, before any of the bills of exchange in this plea mentioned became due and payable, and before and at the time of the commencement

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of this suit, had notice. And the defendant fur
saith, that before and at the time of the commen
ment of this suit, the said several and respective
of exchange in this plea firstly mentioned, and
three latter whereof are the said bills in the
declaration mentioned, had alone become or were
or payable, the remaining four of such bills or an
either of them, not having arrived at maturity
become due or payable, according to the tenor
effect thereof, at the said time of the commencem
of this suit: And this defendant further saith, tha
the defendant did, in pursuance of the said agreem
so entered into between him and the plaintiffs as af
said, well and truly pay to the plaintiffs one-half of
amount of the said several and respective seven b
of exchange in this plea first mentioned, in full sa
faction and discharge thereof, as and when and on
respective days and times on which the same se
bills of exchange respectively became due and payal
according to the tenor and effect thereof, and of
several and respective sums of money secured there
and the defendant always, from the time of the mak
of the said agreement between the plaintiffs and
defendant, to the time of the commencement of t
suit, was ready and willing, and still is ready and will
to observe and perform the same agreement, in
respects, so far as the same was or is to be obser
or performed on the part of the defendant; of all wh
the plaintiffs have always had notice. Verification.

Replication, that the plaintiffs did not, with
view or intention in the said plea mentioned, ag
with the said defendant to accept and receive paym
of one-half of the amount of the said several a
respective bills of exchange so drawn by the s
plaintiffs, and accepted by the said defendant, as
the same plea mentioned, as and when the same bi

ectively became due, or of the sum of money which defendant was or would become indebted to the plaintiffs by reason thereof, in manner and form he defendant has above in the same plea alleged. t the trial before Lord *Denman* C. J. at the last rey assizes, it was proved by *Reader*, a witness for defendant, that whilst the bills drawn by the plain- and accepted by the defendant, and which were the plaintiffs' hands, were running, he had called n the plaintiffs at the request of the defendant, and ed to them that the defendant was insolvent, and lied to them to know if they would take a compo- n. He left a statement of defendant's accounts h one of the plaintiffs, and called again the follow- day, accompanied by the defendant, when they l an interview with the same person, who inquired at the other creditors were willing to do, and he informed, that they would no doubt come to any ngement which he made. He then agreed to ept a composition of 10*s*. in the pound, and at their uest wrote the following letter, addressed to the ness.

SIR,—I hereby agree, that upon payment of half amount of our bills upon *Richardson*, as they ome due, that is to say, 10*s*. upon our debt, to give a full and complete discharge for the same.

"*J. Reay*."

t was objected at the trial, that as this letter con- ed the agreement entered into by *J. Reay*, evidence the inquiries as to the other creditors before the eement entered into, was not admissible, as the ct was to add other terms to the agreement entered by the plaintiff; but the lord chief justice admitted evidence, and the jury found a verdict for the endant.

tiffs to the composition, or to be sh
creditors. Then why is not the accor
sation evidence to show the intentic
was given, and the object for which tl
made? It would be for the jury to c
dence which of the two objects the pa
and I think they would have no dif
that it was given in order to be sho
Richardson and the other creditors.] J
v. *Jones* (*a*). [*Parke* B. That case c
the present. I have no doubt that
was evidence to show the intention
agreement was entered into (*b*).]

He then applied for judgment, no
dicto, on the ground that the plea
the action, and obtained a rule.

Channell and *Petersdorff* showed c
tend for the defendant, first, that t
take 10*s*. in the pound, as composition
Sir *W. H. Richardson*, and also that
such prejudice by the act of the
be a sufficient consideration to mak
binding on them. It is true that an
creditor to receive less than the am
is only binding on him, when the se

other parties, and induces other creditors to come in and accede to a composition, *Steinman* v. *Magnus* (a), *Fawcett* v. *Gee* (b). Now, here Sir *W. H. Richardson* was prejudiced by the plaintiffs having consented to this agreement, which "lured and induced" him to agree to accept and receive one-half of his debt in full satisfaction for the same. [Lord *Abinger* C. B. This plea does not state that other creditors came in besides Sir *W. H. Richardson*. If they did not, neither Sir *W. H. Richardson* nor the plaintiffs are bound. It is true that in *Wood* v. *Roberts* (c), Lord Chief Justice *Abbott* is reported to have held at nisi prius, that if one creditor, by resolving to discharge his debtor, induces another creditor to discharge him, the first creditor could not recover against that debtor, as it would be a fraud on the other creditor; but that must have proceeded on the particular circumstances of that case, and on evidence that other creditors came in. It could be no fraud on the other creditors, if the debtor was not discharged. The consideration and object of the agreement is, that the majority of the creditors will sign it; and whether the first party signs it with or without communication with them, the same effect follows. The object of the proposed agreement is to liberate the debtor from *all* claims on him. Then if the one or two persons in whom the scheme originates, find that the rest will not agree to the object they wish, why should they themselves lose any advantage they had before, and would otherwise retain? If a body of creditors, sufficient in value to attain that object, concur in such an agreement, I do not think that *all* need. *Gurney* B. All that the plea states is, that the agreement was entered into with a view of inducing the

(a) 11 East, 390.
(b) 3 Anstr. 910.
(c) 2 Stark. C. N. P. 417.

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REAY and Others v. RICHARDSON.

other creditors to accept the composition, and that one creditor agreed; but so far from stating that concurrence of the others, which must form the agreement, it does not even state any application to any other creditor.] The agreement did not stipulate that all the creditors should come in, or, if they did not, that it should be void (*a*); so that the defendant was not bound to apply. Nor is there any case of this kind in which it has been attempted to prove that all the creditors came in, except where it was so stipulated. *Good* v. *Cheeseman* (*b*) was a case in which the plaintiff, and three other of the defendant's creditors, agreed to accept payment out of a third of his annual income, to be assigned by him to a trustee; and it was held, that each of the four was bound by the agreement (*c*), not as a strict accord and satisfaction, but as a consent by the parties signing to forbear enforcing their demands, in consideration of their own mutual engagement of forbearance. *Littledale* J. there says, "It would be unjust, that the plaintiff by this action should prejudice the other three creditors, each of whom signed the agreement, and has since neglected the recovery of his demand, under a persuasion that none of the parties to the memorandum would proceed against the defendant." [Lord *Abinger* C. B. It does not appear that the defendant, in that case, pressed on any of his other creditors, besides *Gloge*, to accede to the agreement.] Then it was properly left to the jury, whether the agreement entered into by the four creditors was conditional only, depending on his

(*a*) See *Lewis* v. *Jones*, 4 B. & Cr. 512.

(*b*) 2 B. & Adol. 328.

(*c*) In that case not only was it not contemplated, as a part of the agreement between the four, that all the other creditors of the defendant were [illegible] come into it, but it was stipulated that if *Gloge* (one of them) did, [illegible] should be yearly paid by defendant out of his income.

ıg to come in, or absolute. We cannot tell
ıe other creditors did not, in fact, come in,
it might be sufficient for the object of relieving
fendant, that a majority of them in value did.
o case an agreement for a composition can be
le, unless all, or a majority of the creditors, sign
ıt all sign at once, or will it become binding
ıe first, second, or third has signed, or not till
l have signed? If the latter, then the persons
ning are not bound in the interval before it is
ed.

't and *C. Turner* contrà, were stopped by the

l ABINGER C. B.—I am by no means prepared
that if several creditors were to sign an agree-
or a composition, on the faith of others coming
that arrangement, and afterwards repented
that was done, it would still be binding on
without any locus pœnitentiæ for them; but
unnecessary to decide that in the present
It is quite consistent with the statement in
sa, that the plaintiffs, on application, agreed to
into this arrangement for a composition, which
be made known to Sir *W. H. Richardson*, and
other creditors, with a view to induce them to
nto it; and that the other creditors, on being ap-
, refused to do so. The ground, or consideration,
e plaintiffs entering into such an agreement,
be the benefit which the defendant would reap
eing exonerated from the claims of the general
of his creditors; but if that object is not ob-
, why are the plaintiffs and Sir *W. H. Richard-*
liged to take the composition, and lose the half
ir debts for the benefit of those creditors who

but I know no decision, that after a
composition has been entered into by
ditors, but a considerable creditor has
others, who had signed it, were bound
binds Sir *W. H. Richardson* from see
his debt against the defendant. If i
of creditors adequate to the object i
sented to such an agreement, they n
though one or more inconsiderable cre
but on that I give no opinion, though w
such defendants, during a long exp
always felt anxious to adduce evidenc
of all the creditors to such an arra
sufficient to say, that upon this plea
that the plaintiffs and another credit
this agreement with the object of induci
ditors to consent to the composition, wh
appear but that all the other creditors
The condition, therefore, upon which t
entered into the agreement, does not
been performed, and the plea is theref
stating sufficient consideration for th
mise.

Bolland B.—The plea shows that t

ALDERSON B.—This plea is bad. It alleges in substance, that in order to induce the other creditors of the defendant to come in to an arrangement, the plaintiffs agreed to accept 10*s.* in the pound on their debts. Then it only states that one other creditor was induced to agree to accept the composition; not that he has accepted it in full satisfaction of his debt, but that he has agreed to accept it only. That is an agreement which is not binding upon him. It seems to me, that the plaintiffs contemplated the assent to the composition, not of one creditor only, but of all of them.

GURNEY B.—The object which these parties had in view has not been accomplished, for as the creditors did not all consent, the arrangement, which was to be general, was only partial. The reason why the case of one creditor refusing to come in to an arrangement of this nature does not often occur, is, because the agreement usually contains a clause, that it shall be void, unless all the creditors above a certain amount come into the arrangement within a certain time (*a*).

Rule absolute.

(*a*) See *ante*, p. 908, n. (*a*).

1835.

AMNER *against* CLARK.

A bill of exchange purporting to be drawn in *London*, payable to the order of the drawer 'in *London*,' upon a party resident at *Brussels*, and accepted by him payable in *London* at a place named, is not a foreign but an inland bill, and must be stamped accordingly, under 55 *G*. 3. c. 184.

ASSUMPSIT by the indorsee against the acceptor of the following bill of exchange:—

"*London*, 11 *Oct*. 1833.
For 312*l*. 11*s*. 9*d*.

At three months date pay this *first* of exchange to the order of self *in London*, 312*l*. 11*s*. 9*d*. sterling, value received, which place to account as advised.

William Walker.

To Mr. *Delianson Clark*, No. 51,
Rue Ducall in *Brussels*. 1st.

Accepted, payable at Mr. *Jebon's*,
No. 16, *Old Broad Street*, *London*.
Delianson Clark.

Indorsed, *William Walker*."

The declaration set forth the bill, and averred its indorsement by *Walker* to the plaintiff, presentment for payment, and dishonour. At the trial at *Guildhall* the bill was produced, and appeared to be stamped with a 4*s*. stamp, the proper stamp on a foreign bill drawn in a set. The defendant was proved to be a merchant resident at *Brussels*, but whether he accepted the bill there or not did not appear. His counsel objected that the stamp should have been 8*s*. 6*d*. *Gurney* B. directed the jury to find a verdict for the plaintiff for the amount of the bill, giving the defendant leave to move to enter a nonsuit. A rule having been granted accordingly, in last term,

Sir *F. Pollock* and *Channel* showed cause. This bill is either properly stamped as one of a set of foreign bills, or is not within the stamp act at all. The defendant will not argue, that being made payable in *England* by the drawer and drawee upon a person re-

sident abroad, who accepts it, making it payable in *England*, it is an inland bill, and as such required an 8*s.* 6*d.* stamp. The schedule, part 1. of stat. 55 *G.* 3. c. 184., after stating the duties payable on inland bills, goes on, "Foreign bill of exchange or bill of exchange drawn in, but payable out of *Great Britain*, if drawn singly and *not in a set*, the same duty as on an inland bill of the same amount and tenor;" and adds, that "foreign bills of exchange *drawn in sets*, according to the custom of merchants, *for every bill of such set* shall be charged with duty according to the amount thereof, where it shall exceed 200*l.* and not 500*l.*, 4*s.* This must be taken to be a foreign bill drawn in a set within the latter description, and the 4*s.* stamp is right. As it appears to be the first of a set, and it is not proved that there were not a second or third of it, it is not to be presumed that there was any fraud. The plaintiff was not obliged to produce more than one bill of the set, even where the defendant appeared to have the other part, and might have been served with notice to produce it; *Holdsworth* v. *Hunter* (*a*). That case also shows, that in any event the defendant, having accepted it as one of a set of bills, is estopped from disputing the regularity of that acceptance. But further, the bill being merely drawn in *London* on a party resident abroad, was not complete till it was accepted at *Brussels* (*b*). If this is neither an inland nor foreign bill within the description in the schedule, no duty whatever will be payable. [Lord *Abinger* C. B. The bill is drawn in *England*, and is made payable there by the drawer himself.] It is not an inland bill. [Lord *Abinger* C. B. The stamp act seems to have considered all bills drawn in *Great Britain* to be inland bills, un-

(*a*) 10 B. & C. 456.

(*b*) But see *Snaith* v. *Mingay*, 1 M. & S. 87; *Crutchley* v. *Mann*, 5 Taunt. 529.

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AMMER v. CLARK.

less they are made payable out of it.] The act does not define the meaning of 'inland bill.' [Lord *Abinger* C. B. It defines it in fact by laying down what a foreign bill is, so that bills not falling within that description, are to be taken to be inland bills. This is clearly not a foreign bill (*a*).] In *Mahoney* v. *Ashlin* (*b*) Lord *Tenterden* says, the statute 9 & 10 *W.* 3. c. 17., intituled an act for better payment of inland bills, distinctly explains what was understood to be an inland bill at that time, and shows that by that term was meant a bill drawn in *England, Wales*, or *Berwick-upon-Tweed, upon London*, or some other place *within* those parts of the realm; and the term is used in subsequent statutes apparently in the same sense. Now this bill was drawn on a party residing out of this kingdom. As to the absence of proof that the bill was in fact accepted abroad, it was for the defendant to have proved any fraud on the stamp act; *Abraham* v. *Dubois* (*c*). This bill is payable in *Great Britain* and is not within the stamp act.

Platt and *Humfrey* contrà, were stopped by the court.

Lord ABINGER C. B.—The argument for the plaintiff has been very ingenious, but I am of opinion that this cannot be taken to be a foreign bill of exchange. The legislature have not defined what is an inland bill, nor do I think it necessary that they should, as they do describe what a foreign bill is; and as it seems to me to show that by foreign bills they intended bills drawn in *Great Britain* but payable out of it, it is clear they never meant to impose a stamp on bills drawn out of this country, because they could not do so: but they

(*a*) See Bayley on Bills, 5th ed. p. 26; Chitty on Bills, 7th edit. 171; *Mahoney* v. *Ashlin*, 2 Bar. & Adol. 478.

(*b*) 2 B. & Adol. 478.

(*c*) 4 Camp. 269.

lid mean to tax bills drawn in, though payable out of, *Great Britain*, because they were able to do so. The primâ facie purview of the act is, that inland bills are all such as are not payable abroad.

BOLLAND B.—I am clearly of opinion that this is an inland bill within the stamp act, being a bill drawn in and payable in *Great Britain*. Nothing in the stamp act prevents inland bills from being drawn in different ways.

GURNEY B.—By the stamp act a bill drawn in *Great Britain* for the amount of this bill, must be stamped with an 8*s*. 6*d*. stamp, unless it is so drawn but payable abroad. Now this is so far from being a bill drawn payable out of *Great Britain*, that it is expressed, by drawer and acceptor, to be payable there. Nor was it ever shown to have been out of this country.

Rule absolute to enter a nonsuit.

PELLECAT *against* ANGELL.

DEBT on a bill of exchange for 63*l*. 4*s*., dated 5th *April* 1830, drawn at *Paris*, and accepted by the defendant, payable three months after date to plaintiff or his order. Pleas, first, that the defendant had been discharged under the insolvent act on 9th *December* 1830; secondly, as to the said second and last counts, that defendant never was indebted in manner and form as therein alleged, &c.; thirdly, that the

It is no answer to an action by a foreigner, to recover the amount of a bill accepted for goods sold and delivered abroad to the acceptor, a *British* subject, that the seller was aware at the time of the sale and delivery, that the purchaser intended to smuggle them into this country without paying the legal duties, and paid a less sum for them than their real value. Form of plea of bankruptcy in *France*.

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PELLECAT v. ANGELL.

causes in the declaration mentioned, and every part thereof, accrued in parts beyond the seas in *France*, and that after the same and every part thereof accrued, to wit, on the 19th *March* 1835, and before the commencement of this suit, the plaintiff then being in *France* and a subject of the kingdom thereof, and being indebted to certain persons, then also being in *France* and also subjects of the kingdom thereof, became a bankrupt according to the law of *France*, and that thereupon all the estates and effects of the plaintiff, and the said causes of action in the said declaration mentioned and every part thereof, then, according to the law of *France*, became divested out of the plaintiff and became and now are vested in M. *Felourens* in trust for the said creditors of the plaintiff, and this the defendant is ready to verify, wherefore he prays judgment. Lastly, to the first count the defendant says, that before the time of his accepting the bill of exchange therein mentioned, it was, in parts beyond the seas in *France*, agreed between the plaintiff and the defendant, then being a subject of our lord the king, as the plaintiff well knew, that the defendant should buy of the plaintiff divers of his goods and chattels and at a small price, being less than the real value of the same, for the purpose of the defendant getting the same, against the laws of this realm, smuggled into this kingdom, and without any of the duty then payable to our lord the king on the importation thereof being paid thereon; and the defendant says, that the plaintiff did, in pursuance of such unlawful contract in such parts beyond the seas, afterwards then sell the said goods to the defendant for the purpose aforesaid; and the defendant avers, that in the said parts beyond the seas, afterwards, and in payment of the said goods and for no other consideration, he accepted the said bill of exchange in the first count mentioned, and that he never had any other

consideration for accepting or paying the same or any other part thereof. Verification, and prayer of judgment as to the first count. Issues were taken on the first, second, and third pleas.

Special demurrer to the last plea, assigning for causes, that the plea confesses the cause of action in the said first count mentioned, but does not in any manner avoid the same, inasmuch as the defendant hath not stated or shown in his said plea, that the plaintiff had any participation in the alleged smuggling of the said goods into *England*, nor hath the defendant stated or shown any other matter or thing to invalidate the contract so made between the plaintiff and the defendant. Joinder.

The point stated for the plaintiff in the margin was, that the defendant ought to have shown in his plea that the plaintiff participated in the alleged illegal transaction.

Humfrey for the plaintiff, supported the demurrer on that ground. All that the plea discloses is, that the plaintiff knew the defendant's illegal purpose of smuggling goods into *England* without payment of duty, but that did not invalidate the contract to pay the acceptance given for the goods, as their delivery abroad was complete, *Holman* v. *Johnson* (*a*). He also cited *Biggs* v. *Lawrence* (*b*), *Hodgson* v. *Temple* (*c*), *Brown* v. *Duncan* (*d*), and *Wetherell* v. *Jones* (*e*). In *Waymell* v. *Reed* (*f*) the seller took part in the illegal transaction, for he packed the goods in prohibited packages. This plaintiff is a Frenchman, and owes no allegiance to the revenue laws of *England*.

Mansel for defendant. The pleadings admit the con-

(*a*) Cowp. 341. (*b*) 3 T. R. 454. (*c*) 5 Taunt. 181.
(*d*) 10 B. & C. 93. (*e*) 3 B. & Ad. 221. (*f*) 5 T. R. 599.

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tract to be for sale of goods under their real value, in order to answer the risk of getting the same smuggled into this country. The express purpose then was to defraud the revenue, nor is it averred that the goods were delivered abroad. [Lord *Abinger* C. B. It was for you to have averred that the goods were delivered in *England*, so as to establish the illegality.] The immoral purpose, being part of the agreement, is sufficient to avoid the contract, *Catlin* v. *Bell* (*a*).

Lord ABINGER C. B.—I am of opinion that this plea is bad: a contract by a *British* subject to evade or contravene the laws of this kingdom is void; but all the cases show, that a foreigner, not bearing allegiance to our sovereign, is not bound to observe our revenue laws, though when he infringes them himself, he cannot recover in our courts the proceeds of that his illegal act. But his knowledge that what he sells is intended to be smuggled into this country, contrary to our fiscal laws, is not illegal. For many years we ourselves made extensive foreign exports in direct violation of the laws of the continental powers for their exclusion. If, indeed, the seller take an actual efficient share in the illegal adventure, by packing the goods in packages of a prohibited size or otherwise, he must take the consequences of his own act; but the mere sale by a foreigner to a person who intends to break our fiscal law, is not void as an illegal contract. The plea does not aver, that the not having smuggled the goods was a breach of the contract, which it must have been had the contract been made for the express purpose of smuggling. All that appears is a transaction common at *Paris*, viz. a sale of goods to a person who may intend to smuggle them here at the time, and if he does,

(*a*) 4 Camp. 183.

give up his plan next day. Nothing imports any ement between the parties, which embraced the gling the subject of sale as an essential part.

LLAND B.—I am of opinion that the plea affords swer to the action. I assent to the distinction ed out by the Lord Chief Baron, between a ven- nerely knowing of the illegal purpose and becom- party to it by some act, as in the cases of *Biggs awrence* and *Waymell* v. *Reed*.

LDERSON B.—I am of the same opinion. This discloses no facts showing that the plaintiff, by re- ring in this action, would receive the fruits of an l act: then the mere sale to a party who may him- intend to commit an illegal act, is no defence at

URNEY B. concurred.

Judgment for the plaintiff (*a*).

See *James* v. *Catherwood*, 3 Dowl. & Ryl. 190; and Chitty on Bills, 57. note (*e*).

TUNNO *against* MORRIS, Esq.

ROVER for cattle, goods, and chattels. Plea, that before and at the said time when, &c. the defend- was sheriff of the county of *Carmarthen*, and that *John Meredith*, residing within the jurisdiction of

The sheriff, if not judge of the county court, is such a constituent part of it for the issuing

ess of execution on its judgments, that he is not liable for a wrongful act done by iliff in executing such process, he, the sheriff, not being bound to execute it onally, as in the case of writs of execution directed to him out of a superior and not appointing the bailiff who executes it.

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the county court, holden in and for the said county, had been, by virtue of his Majesty's writ of justicies, summoned before the suitors of the said court, to answer *Henry Thomas*, also residing within the said jurisdiction, and that, according to the custom of the said court, the said *H. Thomas* levied his plaint against the said *J. Meredith*, of and concerning a certain cause of action arising within the said jurisdiction, and such proceedings were thereupon had, that afterwards the said *H. Thomas* recovered against the said *J. Meredith* 63*l.* for his debt, &c. And that the defendant, so being such sheriff as aforesaid, afterwards, to wit, on &c. at the suit and instance of the said *H. Thomas*, authorized and commanded all and singular his bailiffs, and also *W.H.*, *C. D.*, and *J. G.*, special bailiffs for that purpose appointed, and each and every of them, to levy of the goods and chattels of *J. Meredith*, in the county of him the said defendant, as well the said debt of 63*l.* which the said *H. Thomas*, in the said county court had recovered against the said *J. Meredith*, as above, and to have that money at the next county court to be holden in and for the said county, to render to the said *H. Thomas* for his debt and damages, together with the said precept, which said precept was delivered to the said *W. H.*, *C. D.*, and *J. G.*, as such special bailiffs, to be executed in due form of law: and by virtue of the said precept the said goods were by them seized, which was the same supposed conversion whereof the plaintiff had complained. Demurrer and joinder.

Crowder for the plaintiff. This plea does not justify the taking the goods of the plaintiff, and does not state the goods taken to belong to *Meredith*. [Stopped by the court.]

Chilton in support of the plea. The plea admits that *Meredith's* goods should have been taken, but that the plaintiff's were in fact taken. But it is enough that the defendant, in his capacity as judge, justifies his own share of this taking; for he is not responsible for the act of his subordinates in executing process issued by him as judge from his own court, as he would be in the case of process from a superior court, which, as a ministerial officer, he ought to execute himself. [Lord *Abinger* C. B. Can you set up as a defence that the defendant was not liable at law, without pleading the general issue?] No such ground of demurrer is stated, but *Carr* v. *Hinchliffe* (*a*) proves the defendant had a right to put a defence arising from matter of law on the record. *Holroyd* v. *Breare* (*b*) is in point. It was decided there, that as a steward of a court baron is a judicial officer, trespass could not be maintained against him for the bailiff's mistake in taking the goods of *B.* under a precept commanding him to take those of *A.* The court overruled the argument that the steward was a mere minister to execute process, and that his warrant to his officer was analogous to that of a sheriff to his bailiff, *Abbott* C. J. saying, "The steward is not merely a minister of the court, but a constituent and essential part of it. The court cannot be held without him; no mandate is directed to him as an officer, but he makes his mandate to the bailiff; and there is this material distinction between the mandate of the sheriff and that of a steward of a court baron, that in the former, the sheriff commands the bailiff to make the levy, concluding thus, 'So that I may have the same before the court.' But in the warrant of the steward, the bailiff is directed to levy, so that he, the bailiff, may have the same before the court on the day

(*a*) 4 B. & Cr. 547. (*b*) 2 B. & Ald. 473.

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appointed. This, therefore, is more like the writ of the superior court to the sheriff, than the warrant of the sheriff to the bailiff." That seems decisive to show that the bailiff and not the steward is the minister of the court baron for execution of its process, and not the servant of the steward in this respect. Now the precept of the sheriff, sitting in his county court, resembles that of the steward in *Holroyd* v. *Breare*, and the county court cannot be held without him as a constituent part of it, which is the express ground of *Best* C. J.'s judgment in *Tinsley* v. *Nassau* (*a*), where that learned judge held, that the sheriff was not liable in trespass for his officer's act in taking the goods of the wrong person to satisfy the judgment of the county court.

The COURT here called on

Crowder to support the demurrer. The suitors of the county court are its judges, and the sheriff is not a judicial but a ministerial officer, as much identified with the bailiff in executing the process of that as of a superior court. *Jentleman*'s case (*b*), which was not cited in *Holroyd* v. *Breare*, decided that in proceedings in ancient demesne, court baron, or county court, whether by plea without writ, or by writ to the lord, bailiffs, or sheriffs, the lord of the manor, or the bailiffs, or sheriffs, are not judges, but the suitors are the judges. [Lord *Abinger* C. B. Nor does Lord *Tenterden* question that case; for he says, that though the suitors are the judges, the sheriff is a constituent part of the court. The suitors could not assemble without his presence or sanction, and he is the person to give the judgment and direct execution to issue. *Alderson* B. The question is, whe-

(*a*) Mood. & M. 52. (*b*) 6 Rep. 118.

ther the officer seizes for the sheriff or for the court of which he is a constituent part; the first is the usual case.] That is so here. A sheriff is identified with the officer entrusted and appointed by himself to execute process. The exception to this rule, in the case of the bailiff of a liberty, who is not appointed by a sheriff, proves the rule. It appears from *Comyns*'s Digest, title *County*, (C 13), that if the sheriff delays execution in the county court, a writ *de executione judicii* may be directed to him out of Chancery to do execution, and upon disobedience, an attachment may issue against him. That shows he is the ministerial officer of the county court, as he is described to be by *Blackstone* (*a*). Lord *Coke* (*b*) says, he is not judge of the county court except in *redisseisin*. [Lord *Abinger* C. B. The passage from *Comyns* shows that the sheriff is a constituent part of the county court, to whom the writ is directed, on account of the suitors being a fluctuating body. Therefore, as he is the person bound to see it executed, he is a ministerial officer. The ancient writ *de executione judicii* has ceased to be issued in practice; the want of it appears to be supplied by *mandamus*.] The general rule as to the sheriff's liability will prevail, for as he appoints three special bailiffs to execute process, he is liable for the acts done by them, his servants, they not being a constituent part of the court, but depending on him.

Lord ABINGER C. B.—Though this plea certainly amounts to the general issue, and is bad on that account, still, as that is not made a ground of special demurrer (*c*), we must consider the defence in the terms used in the plea, and I am of opinion that it affords an

(*a*) 3 Com. 36. (*b*) 4 Inst. 266.
(*c*) See 1 Chitty on Pleading, 4th edit. 443.

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answer to the action. *Tinsley* v. *Nassau* (*a*) is directly in point for the defendant, and in *Holroyd* v. *Breare* (*b*), Lord *Tenterden* most accurately pointed out the distinction, as to the form of the writ differing from that of the ordinary warrant of the sheriff to the bailiff. Besides, bailiffs employed in executing the process of superior courts, directed to the sheriff, give security to him for its due execution; but that is otherwise in the case of process from the county court, for the plaintiff there chooses his own bailiff. That appears from this plea, which does not allege that the defendant appointed the three special bailiffs. Then the plaintiff is responsible for any wrong committed by them. Again, the sheriff, though not the judge, is in point of law the assistant to the county court, and as much a constituent part of it as the entering clerk of a court of record, whose duty it is to enter the judgment and see the writ of execution issued, and yet was never held liable for any mis-execution of the process. The cases cited establish the distinction between the sheriff's situation as an officer of the superior courts of justice, and as an officer of the county court, which is, in fact, his court. This sheriff, therefore, was not here responsible for the acts of the bailiff, and the plea not having been objected to in proper time and manner, as amounting to the general issue, is good.

BOLLAND B.—*Holroyd* v. *Breare* was much considered, and is not affected by *Jentleman's* case, nor was any attempt made to overturn the *nisi prius* decision of *Tinsley* v. *Nassau*. The sheriff is in truth the efficient judge of the county court, and certainly an essential part of it; so that he is there in a situation very different from that in which he stands as officer of the courts at *Westminster* for several purposes.

(*a*) M. & Malk. 52. (*b*) 2 B. & Ald. 473.

ALDERSON B.—In the case of process issuing from e superior courts, the sheriff is the party who is, in e first instance, ordered by those courts to execute eir process; and as he deputes subordinate officers to the act he is so ordered to do, he is properly re-onsible for their acts. On the other hand, in the unty court he is not the party ordered to execute e writ of execution personally, but, acting under ection of the suitors, he directs the bailiff to put in ce the execution which rests upon their judgment, d to have the money at the next county court to ren-r to the plaintiff in the suit. His situation with spect to the superior court, is widely different from at which he holds as regards the county court.

GURNEY B. concurred.

The COURT refused to allow *Crowder* to reply, by king issue on the facts pleaded.

Judgment for defendant (*a*).

(*a*) See *Boothman* v. *Earl of Surrey*, 2 T.R. 11; *Saunderson* v. *Baker*, 2 a. 834; *Ackworth* v. *Kempe*, Doug. 40.

HART *against* NASH.

If the holder of a bill agrees with the party liable to pay it, that the latter shall supply the

ASSUMPSIT on a bill of exchange, by indorsee against indorser. Plea, *actio non accrevit infra* ex *annos*. Issue thereon, tried before Lord *Denman* at he last *Surrey* assizes.

older and his family with hats till he can pay the bill, and that the hats should e paid on account, and the hats are delivered and received accordingly between the rties, that transaction will be part payment within the exception of 9 *G.* 4. c. 14. as to take the case out of the statute of limitations, 21 *Jac.* 1. c. 16.

the defendant should supply plaintiff with hats till he could pay the bill, and should be paid on account," which v the parties. It appears that the last to the plaintiff by the defendant, in par bill, was made in *December* last. Th Justice held this such a 'part payme case out of the statute of limitations, w tion in 9 *Geo.* 4. c. 14. and the plainti In *Easter* term *Platt* obtained a rule trial, on the ground that no price at were to be taken appeared; but whe on for argument, and the report had b mitted, that upon the above statement not support his rule.

Comyn, who was to have shown ca *Williams* v. *Griffiths* (*a*), distinguishin which there was no such satisfaction, b tween the parties, as appeared in that l

ALDERSON B.—The point arises o limitations, whether there has been under an agreement between the partie tiff should take goods of the defenda ment of his indorsement. As the go

plea and bring the case within the exception in 9 *Geo.* 4. c. 14. Lord *Tenterden*'s act, as to part payment.

The other Barons concurring,

Rule discharged.

DOE on demise of BISHTON *against* HUGHES and Others.

EJECTMENT for 100 messuages, 1000 acres of land, &c., by a mortgagee against twelve tenants of the mortgaged premises, which were principally encroachments on waste of a manor in *Anglesea*. The lessor of the plaintiff gave a particular of the premises sought to be recovered, which specified the fields and farms by their names, as well as their boundaries and quantities. The twelve tenants entered into the usual consent rule as tenants, and claimed title to defend as much for part of the tenements in question, which part was stated in the consent rule to consist of 50 messuages, &c., 500 acres of land, &c., situate, &c., and conceased lease, entry, and ouster, and possession of the premises. On the day of the trial, at the last *Spring* assizes for *Carnarvonshire*, two of the defendants, *Jones* and *Owen*, who had become tenants before the plaintiff's mortgage title accrued, obtained an order from *Bolland* B. after argument, to withdraw their pleas of not guilty, and suffer judgment by default, on payment of all costs, consequent upon their having pleaded, and upon such amendment. Their names

Twelve defendants in ejectment entered into a joint consent rule, without specifying the particular premises for which each respectively defended. At nisi prius the judge ordered that two of them be at liberty to withdraw their pleas and suffer judgment by default, and that the record should be amended by striking out their names; but did not order the consent rule to be altered or amended. The trial went on, the two defendants did not appear, and the judge refused to nonsuit for want of their appearing to confess lease, entry, and ouster; the other ten established a defence and had a verdict. Held, that the consent rule was not virtually amended by the order; and that the plaintiff was therefore entitled to a general verdict against all the defendants, but subject to paying the ten defendants who went to trial the costs of their defence.

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were accordingly struck out of the record, but the consent rule remained as before. When the cause came on, the counsel for the lessor of the plaintiff claimed a nonsuit for non-appearance of these two defendants to confess lease, entry, and ouster, so as to entitle the lessor of the plaintiff to judgment (a); but the learned baron refused, and the case went on against the other ten, who appeared to have become tenants to the mortgagor before the mortgage, and not having received notice to quit, obtained a verdict. In last term, *J. Jervis* moved, pursuant to leave reserved at the trial, to set aside the verdict and enter it for the plaintiff with 1*s.* damages, on two grounds; first, that the judge had no authority to make the order; and, secondly, that he misdirected the jury, inasmuch as the lessor of the plaintiff was entitled to a general verdict against all the defendants. He contended that if the judge could alter the record, it should have been repassed and resealed after the parties had been changed; nor could he vary the rule of court in which they had all agreed to defend jointly. The plaintiff was entitled to recover in the action, the defendants not having severed the premises for which they defended, and having confessed possession generally; *Doe* v. *Raby* (b). The action was in fact defended by the mortgagor. A rule having been granted,

Meeson and *Tomlinson* showed cause. The judgment of *Bayley* J. in *Thrustout* v. *Shenton* (c), shows, that a judge at chambers, or on circuit, has power to allow a defendant to suffer judgment by default in ejectment, as to any parcel of the premises they intend to give up, as well as in other actions. As to the power of a single judge to set aside an order of court, *Wood* B. in one instance, even discharged the consent rule; *Adams*

(a) Bull. N. P. 98; Tidd, 9th ed. 1237. (b) 2 Bar. & Adol. 948.
(c) 10 B. & Cr. 111.

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on Ejectment, 230 (a). A judge sitting alone may vacate mere formal acts of the court, which are often done at chambers, or by the officers, though he could not so set aside its solemn judgments. Here the plaintiff never applied to a judge at chambers to order the defendants to specify the premises for which they defended. [*Alderson* B. Suppose the ejectment to have been for one house, would not this consent rule have left it open to contend that the ten had a right to defend for the whole of it? As all twelve defendants defend for the same premises, what is true of ten is true of the other two. Your object is to make two defend for two separate tenements, but the difficulty is, that twelve having originally defended for the premises A, two afterwards withdraw their defence; upon which the other ten say they continue to defend for premises A. The order made at nisi prius should have specified the premises to be taken out of the consent rule, as well as the defendants who withdrew from the defence.] As the order in fact amended the record, the consent rule being a stay, merely auxiliary and subordinate to the principal matter, was in fact amended by the order, and the defendants were virtually struck out of the consent rule. The large and imaginary statement of 50 messuages, &c. will as well apply to the premises remaining in possession of the ten defendants, after withdrawing the defence by *Jones* and *Owen*, as they did to the whole before. *Jones* and *Owen*'s premises must be considered as part of the residue of the 50 messuages, &c. as to which there was no defence originally. The consent rule may too closely follow the vague generality of the declaration, but the lessor of the plaintiff might have obtained a particular of the premises for which each defendant intended to defend. At all events this court might amend the consent rule,

(a) Cited 2 Nev. & M. 28.

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so as to make it conformable to the order. The lessors of the plaintiff took their chance of succeeding against the other ten defendants, instead of taking their judgment as to the premises in possession of the two, and proceeding no further. Suppose the two who withdrew not to have done so, and to have had as good a defence as the other ten, then, by the argument on the other side, if they did not defend for all the premises in the consent rule, the plaintiff would be entitled to a formal judgment for 38 messuages, the difference between the number formally declared and defended for, and the number actually defended for as being in fact occupied by the twelve defendants; and that judgment would carry the costs. The ten who have succeeded cannot be subject to pay costs in respect of the two who have disclaimed, for no defence was made by the ten as to the premises in possession of the two.

J. Jervis and *Welsby* supported the rule. These were separate ejectments, consolidated by order of court. The twelve defendants, by defending jointly under the consent rule, admit a joint possession of the whole premises sought to be recovered. [*Gurney* B. Suppose the twelve defendants to have defended for twelve different tenements.] The consent rule should have specified any particular tenements for which each defended; in this case, however, the consent rule being as general as the declaration, the ten have admitted themselves in possession of the whole premises which the twelve before defended for; viz. including those possessed by the two defendants, *Owen* and *Jones*, who came in subsequently to the mortgage, and had therefore no defence to the action. As the record stood before trial, the lessor of the plaintiff was safe in going on, as *Owen* and *Jones* had not been in possession before the mortgage was executed. But,

under this order, those two defendants escaped liability to further costs, and the other ten defended for the identical premises which all twelve had defended for on a joint possession. Then the lessor of the plaintiff is entitled to a general verdict, for all that the ten defendants did not defeat his title to, *Doe* v. *Raby* (*a*); and will take possession at his peril of the premises to which he was entitled by judgment by default. The consent rule could not have been directly altered, without payment of the costs of the issue to that time, as well as the mere costs of the amendment. The generality of the consent rule put the lessor of the plaintiff to expense; for the defendants should have followed the rule of court, *M.* T. 1820, by specifying the premises for which each defended, in which case the plaintiff might have entered a *nolle prosequi* as against the ten, and gone on against the two only.

BOLLAND B.—The court is of opinion that a verdict ought to be entered for the plaintiff, because the consent rule remains unaltered as to the parts in possession of the two defendants who withdrew their pleas; the plaintiff, therefore, is still entitled to recover for the same premises for which the twelve defendants originally came in under the consent rule to defend jointly.

ALDERSON B.—The consent rule was a joint admission by all the defendants that they were all in possession of the whole premises claimed. Though two of them have withdrawn their pleas, and desisted from any further defence as to the part in their individual occupation, ten continue to defend for the same premises, which still remain unaltered in the consent rule. Then how is their situation altered? The lessor of

(*a*) 2 B. & Ad. 948.

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the plaintiff has proved a title to a certain part of these premises, which the ten defendants did not disprove, but, on the contrary, failed in their defence as to it. The lessor of the plaintiff would have a right undoubtedly to take out a writ of possession for that part only. The only question at present is evidently about the costs, and they seem to me, in every point of view, to belong to the lessor of the plaintiff. The master on taxing them will allow the ten defendants their costs of proving their title to the particular premises for which they defended, and deduct them from the general costs.

Gurney B.—I entirely concur.

Rule absolute to enter a verdict for the lessor of the plaintiff for 1*s*. (*a*)

Tomlinson afterwards applied to the court to alter the minutes of the rule, by directing that the verdict should be entered for the lessor of the plaintiff for all but the ten messuages, &c. in the possession of the ten defendants who appeared, and for those defendants as to those messuages, &c., contending that the costs of the case fell within No. 74, of *Reg. Gen. Hil.* T. 2 *Will.* 4. as to costs, where some issues are found for plaintiff and some for the defendant.

J. Jervis and *Welsby* resisted this application, on the ground that the verdict in ejectment was general and could not be apportioned; and that if the title of a lessor of the plaintiff was not disproved as to a part of the premises, he was entitled to a general verdict, though it was afterwards at his peril to take out his writ of possession for any other than for that part of

(*a*) See 3 Bac. Abr. tit. Executors, (N.) p. 92.

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the premises to which he proved an unimpeached title. In *Rex* v. *Sheet* (a), the Court of King's Bench refused to alter the *postea* by entering up the verdict for one of two defendants, though he had disproved the plaintiff's title as to particular premises in his occupation.

Lord ABINGER C. B.—Of late years a practice has prevailed for defendants in ejectment to specify in the consent rule the particular messuages, &c. they intend to defend for,

The COURT finally ordered that a verdict should be entered for the plaintiff for 1*s.*; that the writ of possession should be taken out only for the premises in possession of the defendants *Owen* and *Jones*; that the plaintiff should have the general costs of the cause; and that the other ten defendants should have the costs of defending for the premises to which they proved title.

Rule absolute on those terms.

(a) 4 Nev. & Man. 42.

DAVIES, Assignee of WATTS, an Insolvent Debtor, *against* ACOCKS.

A trader in insolvent circumstances, and in prison, negotiated

ASSUMPSIT for money had and received to the use of the assignee of an insolvent debtor, and on an account stated. Plea, general issue. At the trial

with his creditors for his discharge; they proposed that he should execute a composition deed, assigning all his effects to one of them, in trust, for the benefit of the creditors. He refused, but afterwards saw a letter written by an agent of their's to a third person, saying that they could not consent to the debtor's discharge, and that he must either execute an assignment, or be made a bankrupt. Three days after reading this letter, the insolvent, with great reluctance, executed the assignment to the party selected by the creditors:—Held, that this was not a void conveyance, as "voluntarily" made under s. 32 of the insolvent act, 7 *G.* 4. c. 57., and that the

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before *Gurney* B. at the *Middlesex* sittings in last *Easter* term, the following facts appeared in evidence. One *Watts* being indebted to the plaintiff, was arrested at his suit on 14th *May* 1833, on a writ issued the day before, and was taken to prison. While there, he negotiated with his creditors for his discharge, they insisting on his executing a deed of assignment for the benefit of all his creditors, and he urging other terms, which they would not accede to. At last, their agent wrote a letter to one *Gulston*, in which they said they would not consent to *Watts*'s discharge, and that he must either sign the composition deed or be made a bankrupt. This letter was shown to *Watts* while in prison, who was very averse to execute it, but after considering it three days, he at last, on 7th *June* 1833, very reluctantly assigned by deed all his estate and effects to the defendant, in trust to collect the effects, pay the expenses, and divide the balance amongst such creditors as should execute the deed. On 5th *June* 1834, *Watts* petitioned for his discharge, and on the 14th *July* following he obtained his discharge under the insolvent debtors' act, 7 *G.* 4. c. 57. the defendant being appointed his assignee. The plaintiff refused to sign the deed, unless the costs, to which he had been put in suing the insolvent, were paid, and in default of that payment, proceeded in the action and obtained execution for 58*l.* 18*s.* 6*d.* The assignment was gazetted on 8th *October* 1833, and the defendant realized 250*l.* by the sale of the insolvent's effects, which the present action was brought to recover, upon the ground that the deed was void under 7 *G.* 4. c.

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assignee appointed by the insolvent court could not sue the trustee for the proceeds of the insolvent's goods as for money had and received to his use.

An assignment by a debtor in insolvent circumstances and in prison, but before petitioning for his discharge under the insolvent act, by which he conveyed all his property to a trustee for the benefit of all his creditors, is not void within 7 *G.* 4. c. 57. s. 32., as a voluntary assignment. Per Lord *Abinger* C. B. and *Bolland* B., and *semb.* per *Alderson* and *Gurney* Bs.

57. s. 32., as a voluntary conveyance. The defendant contended for the validity of the deed, relying on his evidence of the circumstances under which it had been obtained. Verdict for the plaintiff, with leave to move to enter a nonsuit, if the court should be of opinion that the deed was void, as contravening the insolvent act 7 *G.* 4. A rule having been obtained accordingly,

Sir *William Follett* and *Channell* showed cause. The assignment in this cause is void within 7 *G.* 4. c. 57. s. 32., nor does the circumstance of its being a conveyance to or for the benefit of the creditors, who might come in unanimously to execute it, make it more valid. The statute does not intend that the appointee of the party who seeks his discharge under an insolvent act, shall distribute his assets, for they must be distributed by the person appointed by that court to execute that duty under its own control. The section intended to prevent what would be deemed a "fraudulent preference" under 6 *G.* 4. c. 16. s. 32., had the party been within the bankrupt laws. Now a conveyance of a trader's property will amount to a fraudulent preference against those laws, if made voluntarily in contemplation of bankruptcy, and in order to favour a creditor (*a*). [Lord *Abinger* C. B. The bankrupt act, 6 *G.* 4. c. 16. s. 3., expressly declares that any fraudulent conveyance or transfer of the goods of a trader, with intent to delay creditors, shall be an act of bankruptcy. That was so enacted, because such a transaction stripped the trader of the means of carrying on his trade (*b*), which is the very definition of an act of bankruptcy.

(*a*) See *Gibbons* v. *Phillips*, 7 B. & C. 529; *Bevan* v. *Nunn*, 9 Bing. 507; *Flook* v. *Jones*, 4 Bing. 20; 12 Moore, 96, *S. C.*

(*b*) *Fidgeon* v. *Sharp*, 1 Maule & Sel. 196; 1 Taunt. 539; *Wheelright* v. *Jackson*, 5 Taunt. 109, and per *Littledale* J. in *Hunt* v. *Mortimer*, 10 B. & C. 44; *Ex parte Scudamore*, 3 Ves. Jun. 88 (*b*); *Stewart* v. *Moody*, *ante*, 493; *Carr* v. *Burdiss*, *ante*, 136, 309; and cases collected, *ante*, 496 n.

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The doctrine of fraudulent preference grew out of cases arising on the old bankrupt laws.] It is mentioned in terms in sect. 82. which protects payments bonâ fide made by a bankrupt to a creditor before the date of the commission, such payment not being in fraudulent preference of such creditor. But by sect. 32. of the insolvent act, voluntary assignments by persons in insolvent circumstances, though to or in trust for all their creditors, are unprotected and void as against the provisional assignee, if made with a view of afterwards petitioning for their discharge under the act, and the distribution must be according to the insolvent act. [*Alderson* B. That argument would apply under the bankrupt law, for the reason before assigned, viz. that the trader is thereby disabled from carrying on his business, but does not apply to the case where an insolvent "voluntarily" assigns in that sense of the word, which is distinguished from "fraudulently." Effect must be given to the word "voluntarily," as used in sect. 32. of the insolvent act. Its meaning there is, either an assignment made without such valuable consideration as is sufficient to induce a party to act bonâ fide under its influence, or an assignment made spontaneously to a creditor without pressure on his part to obtain it; *Arnell* v. *Bean* (*a*). The natural meaning of the word "voluntarily," is the preference of one creditor over the rest.] The insolvent act does not provide against any such preference, but prohibits persons in insolvent circumstances, whether before or after their imprisonment, from parting with any of their property. [Lord *Abinger* C. B. The section seems to me to have been meant merely to override any fraudulent means adopted to lessen the sum which a party might subsequently offer to the general mass of his creditors;

(*a*) 8 Bing. 91.

for otherwise, after a long imprisonment, a deed of assignment made bonâ fide years before might be set aside. If this was bonâ fide done to effect, at less expense, the same object as a commission of bankruptcy would have accomplished, it is not to be set aside on that account.] The legislature intended, that a deed which would be void under the bankrupt law, should also be void under this act.

The last point relied upon for the defendant will be, that the insolvent executed this deed, not voluntarily, but under a threat of being made a bankrupt. But the opinion of the witness, that the insolvent was reluctant to execute it, is not evidence. No threat of taking out a commission against him was held out. He seems to have executed it in order to obtain his discharge. The hope of that benefit does not make his act the less voluntary.

Platt and *G. T. White* for the plaintiff, were stopped by the court.

Lord ABINGER C. B.—This case may be considered as very important, and involves two points; the first, whether a deed, bonâ fide executed by an insolvent for the benefit of all (*a*) his creditors, is void, as "voluntarily" made within 7 *G.* 4. c. 57. s. 32.; and the other, whether in this case the insolvent in fact executed this deed voluntarily. On the first point, I am of opinion that the deed was not void. The words of the section are as follows:—Stat. 7 *G.* 4. c. 57. s. 32. provides, "that if any prisoner who shall file his or her petition for his or her discharge under this act, shall before his or her imprisonment, being in insolvent circumstances, *voluntarily convey*, assign, transfer, charge, deliver, or make over any estate, real or personal secu-

(*a*) So stated and treated by the court.

is hereby declared to be fraudulent an
the provisional or other assignee or
prisoner appointed under this act. I
that no such conveyance, &c. shall
fraudulent and void, unless made with
before the commencement of such i
with the view or intention by the pa
assigning, &c., of petitioning the said
her discharge from custody under this
words the legislature appears to have i
within the reach of the provisional as
solvent court that class of cases, which
in bankruptcy, were already within t
assignees of the bankrupt, viz. those in
seeks voluntarily to give a preference
over the mass of them. The expressi
under discussion are selected to enun
ent kinds of property which might be c
provide against the transfer of a portic
effects, without necessarily including
of the whole of them for the benefit of
The words respecting "conveyance to
creditors," were inserted to prevent a
the benefit of two or more selected cre
vailing against the body at large. Suc
veyance are made void in terms as a

for debt, make a conveyance to one or more of his creditors, or in trust for their benefit, it would be void. It was, therefore, considered necessary to put a limitation on the word "before," by the proviso subjoined to the same section, which saves assignments made three months before the imprisonment, or at any time before the party intended to petition for his discharge. It might otherwise follow, that if, within three months before the imprisonment, the whole body of creditors should appoint a trustee for their own benefit, and the debtor should assign his effects to him by deed, they might receive the value of the debtor's property, and yet afterwards keep him in prison for years, and drive him to apply for his discharge under the act. Looking at the whole of the section, it appears not to override the case of a man's assigning all his property for the honest purpose of paying all his creditors, for that is an act done, not with a view to prefer one creditor to the rest, but to give them all equal advantages. The section has declared, that a deed executed in order to prefer one creditor to the rest, shall be fraudulent as against the assignees. The word "voluntarily" in sect. 32. seems to point at such conveyances as are intended to be declared fraudulent, for giving preference to some one or more creditors above the general mass, and for no other reason; because were there any other fraud in the transaction, it would be void without this enactment.

As to the other point, if this inquiry was procured by the urgency and the pressure of one or more creditors, or by their threats, it could not be 'voluntarily' executed within this section. Whether, at the time of executing it, the debtor contemplated his discharge, or whether he obtained it in consequence, makes no difference; in this case, indeed, it may be observed he did not obtain it

from their claims, it can make no di
he does that act by deed or under
the act. It is most desirable that
should be attained without driving hi
imprisonment, which are both alike u

ALDERSON B.—I give no decided
first point, whether a bonâ fide conve
the benefit of creditors, is void within
4. c. 67. My hesitation arises from
that the trustee is elected by the pa
whereas the assignee is appointed and
insolvent court. I apprehend, howev
in this case was valid in law. But on
am clearly of opinion that the rule mu
lute to enter a nonsuit. This is a co
debtor to the defendant before any a
provisional assignee. Primâ facie th
good. Then is it avoided by sect.
the right construction of that section
veyance, whether for the benefit of
man's creditors, must be voluntary, or
not avoid it. Then this is the case of
by his creditors, and exposed to the al
ing the trust deed, or having a commis

concur with that already expressed by the rest of the court. The other point is clearly in favour of the defendant.

Rule absolute for a nonsuit.

See the subsequent case of *Doe* d. *Boydell* v. *Gillett and another*, Tyr. & Gr. 114. collecting the cases in p. 117. note (*a*); and per *Coleridge* J. in *Gould* v. *Williams*, 4 Dowl. P. C. 91.

HILL *against* HARVEY.

A capias described the defendant as "*Francis Harvey*, late of *Devonshire Terrace, New Road*:" Held, that this was a sufficient description within the words "*C. D.* of &c." in 2 *W.* 4. c. 39. and sched. No. 4.: as the defendant had been found by that description, was not sworn to have any residence at the time of the arrest, and was not identified in any other way.

RULE to show cause why a bail-bond should not be delivered up to be cancelled, and the defendant discharged out of custody, on entering a common appearance, on the ground that the capias described the defendant as "*Francis Harvey late* of *Devonshire Terrace, New Road*," whereas the form No. 4. in the schedule of *2 W.* 4. c. 39., is "*C. D.* of ——." He contended that a place of present residence should have been described. In answer to the rule, the affidavit of the plaintiff's attorney disclosed, that the defendant's attorney informed him that the defendant had lately resided in *Devonshire Terrace*, but had left it, and that he did not know his then residence; that deponent believed, that at the time of the service the defendant had no settled place of residence.

Godson showed cause, contending that the plaintiff had given the best description of the defendant which he could, and that it had sufficed for the object intended, *viz.* for finding and arresting the defendant. The sheriff was the only person who could have complained of the description being imperfect, to enable

was so described as to enable the offic
the process, to find him; and alluded
between a capias and a writ of summ
be served on a defendant at his resid
defendant has been found, and yet
that he had any subsequent residence
since removed. He also cited *Buffle*

J. Jervis contrà. The forms prov
c. 39. must be adhered to; see sect.
cited, the terms dictated by the form
but only added to, by describing
person in a place where a blank is left
the best description of the prisoner's
the gaol from which he is brought; bu
"late," not given in the schedule, is int
the licence to do so afforded by leavin
must mean the defendant's present
does he appear to have inquired at
late residence to know where he was
of his attorney.

Lord Abinger C. B.—This case s
petency of any forms, which can b
statute, to provide in terms for the e

described simply, or should be so designated as to enable a sheriff to find him at some present or past place of his residence. I am, therefore, glad to find a sufficient authority on which we may decide this case, in the manner which we deem the most proper. By sect. 1. the "place and county of the residence or supposed residence of the party defendant, or wherein he shall be, or shall be supposed to be, shall be mentioned in a writ of summons, for this good reason, that being addressed to the party, it is to be served on him, in order to his doing the act which he is called on by it to do, *viz.* to enter an appearance. Again, the form of a writ of summons shows that the "of &c. in the county of ——," there subjoined to the defendant's name, intends a local description. But a capias is addressed to the sheriff, who may only require a descriptio personæ of the defendant in order to take him. The language of *Taunton* J. in the case cited of *Welsh* v. *Langford* amounts to this, that the blank left in the statutory form of capias, is sufficiently described by whatever gives a clear description of the defendant's person, and that the house, place, parish, or county, where a defendant resides, is not necessarily a part of the description required. Thus, where a defendant is a captain in a marching regiment, it would be difficult to describe him as having any present residence, and it would suffice to describe him "of the —— regiment, captain." Then having no residence, he might be arrested where he is found: as in *Welsh* v. *Langford* the defendant might not be resident in the ship *Kellie Castle.* We think that case absolves us from the necessity of deciding that the blank in the capias must be filled up with the present place of residence of the defendant; it seems to me, that it may be filled with the place of his last residence, where his present residence cannot be found or

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has no trade, profession, or other means by which his descriptio personæ could be rendered sufficient for identifying him. A descriptio personæ would perhaps be better than "late of" the place of his last residence, but I now think such a descriptio personæ as this sufficient, according to the authority cited. I hesitated at first, because strict adherence to the statutory forms saves much trouble and expense; but the extreme difficulty of so doing in all supposable cases, and the injustice which would thereby arise, compel me to hold differently in order not to violate the intention of the legislature. Many men have no residence, except that of the moment. Thus, naval and military men would be often better described by their ships and regiments, than by the place of their last residence. Again, many persons who leave home on apprehending immediate arrest, and wander about the country, could not be arrested, if their present residence must be stated in the capias. The common sense of this matter enables me to come to the conclusion, that the descriptio personæ of the defendant is sufficient in a capias. To have described this defendant as "late of *Devonshire Place*, but residence now unknown," might perhaps have been better than the description here used. We should not have discharged the rule with costs had the application been by the sheriff, but as this is moved by the defendant with costs, it must be discharged with costs.

BOLLAND B.—The defendant's present residence is not known; but the writ might have stated him to have been formerly of *Devonshire Place*, so as to comply with the statute.

ALDERSON B.—I concur with what has been said by my brother *Bolland*. A man would be as well de-

scribed as captain of such and such a regiment, as of such a regiment, captain. There is great force in the argument, that the person of a man should be designated in a capias by adding his profession, &c. as his residence should be in a writ of summons. The court might not bind a plaintiff to insert any place as the residence of the defendant, if none could be found.

GURNEY B.—To have described the defendant as "of *Devonshire Place*," would have been to state that which the affidavit shows would be false, to the knowledge of the deponent.

Rule discharged with costs, as moved.

See, however, as to this case, *Rolfe and another* v. *Swan*, *Easter* term 1836; 1 Tyr. & Gr. 665; in which case *Roberts* v. *Wedderburne*, 1 Bing. N. C. 4, and *Lingredge* v. *Roe*, id. 6, decided in *Michaelmas* term 1834, were cited and relied on.

PENN an Infant, by J. PENN his prochein amy, *against* WARD.

To a declaration for assault and battery, the defendant pleaded that the plaintiff was his apprentice and conducted himself improperly and saucily, wherefore the defendant *moderately* chastised him. Replication, de injuriâ suâ propriâ. Held, that only the cause alleged in the plea was put in issue, *viz.* whether the plaintiff misconducted himself as apprentice to the defendant; and that evidence of immoderate and excessive chastisement could not be given upon the issue so joined.

TRESPASS for striking the plaintiff. Pleas: first, not guilty; secondly, that before and at the times when, &c., in the declaration mentioned, the plaintiff was the apprentice and servant of the defendant in his trade and business of a boot and shoe maker, and there behaved and conducted himself saucily and contumaciously towards the defendant, and then refused

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to obey his lawful commands relating to his duty as such apprentice and servant as aforesaid; whereupon, he the said defendant then moderately corrected the said plaintiff for his said misbehaviour, doing no unnecessary damage to the plaintiff, which are the supposed trespasses in the said declaration mentioned. Verification.

Similiter to the first plea; and to the last plea, that defendant of his own wrong, and without the cause by him in that plea alleged, committed the several trespasses in the said declaration mentioned.

At the trial before *Tindal* C. J. at the last assizes for the county of *Warwick*, it appeared that the plaintiff was apprentice to the defendant in his trade of a shoemaker, and had, while at work, spoken and behaved saucily to the defendant, who had found fault with his work. The defendant thereupon struck him with his open hand on the head. The plaintiff kicked the defendant, and a scuffle ensued, in which the defendant struck the plaintiff several blows, which the plaintiff's counsel proposed to show were unnecessary and excessive. After objection, that as excess was not replied the evidence was inadmissible, the evidence was admitted. *Tindal* C. J. told the jury, that it was for the defendant to prove that the beating was moderate; what they would have to say was, whether, looking to the whole circumstances, the chastisement administered by the defendant was proportioned to the plaintiff's misconduct, or exceeded just bounds? If it was, the defendant ought to have a verdict, and if not, he must pay reasonable damages for the injury he had inflicted. He also observed, that if the correction was in its inception reasonable and moderate, but the plaintiff resisted it, the defendant would have a right to use a greater degree of force in order

prevent the boy from continuing the scuffle. Hav-
; summed up the evidence, *Tindal* C. J. left it to
e jury to say whether the punishment was excessive.
ne jury found, that the defendant corrected the
intiff as his apprentice, but immoderately, and gave
verdict for plaintiff for 1*s.* damages.

Adams Serjt. obtained a rule for a new trial, on the
ound of misdirection. He cited *Phillips* v. *How-*
ite (*a*), *Dale* v. *Wood* (*b*), *Franks* v. *Morris* (*c*), *Pigot*
Kemp (*d*), *Selby* v. *Bardons* (*e*), *Bowen* v. *Parry* (*f*),
nd *Lamb* v. *Burnett* (*g*).

Humfrey and *Miller* showed cause for the plaintiff.
he moderation of the chastisement is at issue, as well
the matter alleged in the plea. For the replication
injuriâ is an answer to a plea justifying on matter
fact only, *Com. Dig. Pleader* (F 19), *Jones* v.
itchin (*h*); as it puts in issue the whole matter in
plea, and consequently, inter alia, the allegation
at the chastisement was moderate. [*Alderson* B.
oes this replication do more than deny the existence
the grounds on which the defendant relied to show
at he was authorized to inflict moderate punish-
ent?] In *Gilbert's History of the Common Pleas,*
44 (*i*), is this case: " So in an action of assault and
attery, the defendant pleads, that the plaintiff neg-
ected his service, per quod moderate castigavit; the
laintiff replies, quod non moderate castigavit, and the

(*a*) 5 B. & Ald. 220.
(*b*) 7 B. Moore, 33.
(*c*) 10 East, 81 n.
(*d*) *Ante*, Vol. III. 128.
(*e*) *Ante*, Vol. III. 430.
(*f*) 1 C. & P. 394.
(*g*) *Ante*, Vol. I. 265; see *Watson* v. *Christie*, 2 B. & P. 224; *Aitken* *Bedwell*, M. & M. 68.
(*h*) 1 B. & P. 76.
(*i*) Citing *Aubery* v. *James*, 1 Vent. 70; 1 Sid. 444. *S. C., nom. Aubry* *James.*

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issue was found for the plaintiff; for though this be an informal traverse and bad on demurrer, being rather a traverse of the chastisement than of the moderate manner of doing it, and the right traverse would have been de injuriâ sua propriâ absque tali causâ, yet after verdict it is good, because the jury have ascertained that he did beat him immoderately." [*Alderson* B. Replication de injuriâ is not in the nature of a general issue, though it no doubt puts in issue the whole cause. The point is, whether the moderate chastisement is part of the cause. Suppose a defendant to plead son assault demesne, would the replication de injuriâ put in issue the allegations of *molliter* and "unavoidably" contained in the plea?] In *Reece* v. *Taylor* (a), the declaration was for assault and false imprisonment; defendant justified in defence of his possession, and also alleged, that the plaintiff assaulted him in the presence of a police officer; replication, de injuriâ: the court held the defendant bound to prove this latter averment, and *Littledale* J. is reported to have said, that under son assault demesne, the defendant must prove an assault commensurate with the trespass sought to be justified. [*Alderson* B. Upon the issue raised by this replication, the defendant must prove that he had good cause to correct the plaintiff, and that he moderately corrected him. "Without the cause alleged," means the cause of the moderate chastisement; but that cause is the saucy behaviour of the plaintiff, for which the correction took place; and how could the replication put in issue the moderation of the chastisemen as part of the cause of it? In *Reece* v. *Taylor* the gently laying on of hands was put in issue as part of the cause alleged in the plea, and thus formed part of the defence.] In *Phillips* v. *Howgate* (b), the plea justified arrest under process of the court, and alleged that the

(a) 4 N. & M. 469. (b) 5 B. & Ald. 220.

laintiff conducted himself with violence while in custody, whereupon the defendant struck him to prevent his escape, and it was held on the replication de injuriâ, that the defendant was bound to prove the plaintiff's violent conduct. [*Alderson* B. There was no justification in that case: and the question was not whether the beating was excessive, but whether the defendant had a right to beat the plaintiff at all. Then as the plaintiff's violent conduct could alone justify that act of the defendant, it formed a material part of the excuse in the plea.] In *Cockcroft* v. *Smith* (*a*), the inclination of the court was to hold that immoderate violence could not be justified under son assault demesne. The cases of *Dale* v. *Wood* and *Pigott* v. *Kemp* by no means conclude this point against the plaintiff. In *Lamb* v. *Burnett* (*b*), the only question was, whether the justification was made out in other respects, independently of that here disputed. [*Alderson* B. In that case Mr. Baron *Bayley*, whose judgment as a pleader was so considerable, never thought of leaving any other question to the jury, except the cause alleged by the defendant as a justification for doing the act complained of, and not the excessive violence. In banc Lord *Lyndhurst* said, "No question can be raised on this record, as to the extent of such punishment." (*c*) Mr. Baron *Vaughan* added, "If any excessive punishment was inflicted on this occasion, it is not put in issue on this record by replication or new assignment." As far as these expressions go, they are in point. Excess was not there the question. The simple question here is, what is the "cause" mentioned in the plea, and whether excess is so put in issue on the terms of these pleadings, as to justify the judge in directing the jury to find any thing respecting it.

(*a*) 11 Mod. 43. (*b*) *Ante*, Vol. I. 265. (*c*) Ibid. 270.

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Adams Serjt. and *G. Hayes* were stopped by the Court.

BOLLAND B.—The court is of opinion, that the plaintiff was bound to reply the excess in order to put in issue the moderation of the chastisement inflicted by the defendant, and that upon these pleadings no such issue is raised. The case cited from *Gilbert's Common Pleas* would have been an authority in favour of the plaintiff, had not later cases drawn the distinctions upon which it is now held that the excess must be replied. With regard to the expressions ascribed to Mr. Justice *Littledale* in *Reece* v. *Taylor*, I may observe, that he does not now think that the plea of son assault demesne requires the defendant to prove the moderation of his conduct. The only question here is, whether more than the cause alleged in the plea is put in issue by the replication. Now, that "cause" is the right of the defendant, under the circumstances of saucy behaviour by his apprentice, to inflict on him chastisement to a moderate amount; in other words, to beat him, because he misconducted himself. That would be a satisfactory defence; and if the plaintiff intended to admit misconduct, but to charge the defendant with committing an excess in punishing, he should have replied, that his misconduct was not of such an extent as warranted such blows. The rule must, therefore, be absolute for a new trial.

ALDERSON B.—I am of the same opinion. The plaintiff complains of a battery by the defendant; the defendant answers, that the battery was the fruit of suitable and moderate chastisement, and proceeds to assign the cause for which he had a right to inflict it, and in respect of which he justifies the trespass which

it involves. That cause is, that the plaintiff behaved saucily in his situation as the defendant's apprentice, and refused to obey his lawful commands; and if true, as it was here proved to be, it justified the defendant in moderately correcting him. The plaintiff in his replication has traversed that cause, and says, the defendant acted not for that cause, but of his own wrong; that is, he has admitted the character of the chastisement to be moderate, but denied the cause, *viz.* his misbehaviour as an apprentice, by which the defendant seeks to justify its infliction. The apprentice, therefore, could not raise any question before the jury as to the excess; because he would, by so doing, justify his own misconduct, alleged in the plea to be the cause of the battery, by the effect of that cause, *viz.* the excess of the beating.

GURNEY B. concurred.

Rule absolute.

SMITH *against* JOHNSON.

ON 1st *May* last a side-bar rule was issued to return the *fi. fa.* issued into *Bedfordshire* herein, on the ground of its having been suspended by a *ca. sa.* subsequently issued. The *fi. fa.* had been lodged at the office of the deputy under-sheriff in *London*, on 23d

On 23d *April*, a *fi. fa.* was sued out into *Bedfordshire*, and lodged in the office of the deputy under-sheriff in *London* (3 & 4 *W.* 4. c. 42. s. 20.) On 25th *April*, viz. by return of post after its receipt, the under-sheriff wrote to say that the defendant had no effects. The plaintiff's attorney thereupon lodged a *ca. sa.* at the deputy under-sheriff's office in *London* on that day, but finding before the return of the *fi. fa.* and before execution of the *ca. sa.* that the defendant had effects, wrote to the under-sheriff to countermand the execution of the *ca. sa.* Held, that the sheriff was bound to return the *fi. fa.*; and *semble*, the issuing the *ca. sa.* did not countermand the levy under the *fi. fa.*

Whether the lodging a *ca. sa.* at the office of the deputy under-sheriff in *London* be a supersedeas of a former writ of *fi. fa.*—*Quære.*

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April. On the 25th, the plaintiff's attorney having heard from the under-sheriff that the defendant was a lodger without effects, sued out a *ca. sa.* and lodged it at the same office in town (*a*). On the 29th, the plaintiff's attorney having discovered that the defendant had effects, wrote to the under-sheriff, directing the *ca. sa.* not to be executed. A rule was obtained in *Easter* term to set aside the side-bar rule, on the ground that the issuing the *ca. sa.* put an end to, or at least suspended the sheriff's duty to return the *fi. fa.*

Kelly and *Theobald* showed cause. There is nothing in issuing the *ca. sa.* which necessarily operates even to suspend the operation of the *fi. fa.* which preceded it; for the rule is, that a plaintiff may sue out concurrent writs of execution against the goods and person of his debtor, or may follow up his *fi. fa.* against the goods by subsequently issuing a *ca. sa.* against the person: but if he use the *fi. fa.* first, he makes his election, after which he cannot use the other process till after the return of the first; *Miller* v. *Parnell* (*b*); *Primrose* v. *Gibson* (*c*). [*Parke* B. By sending one after the other, you may be said to intend the second to be executed, unless you order the contrary.] That does not necessarily follow as matter of law. Here, when the execution of the *ca. sa.* was countermanded, it became the duty of the sheriff to execute the *fi. fa.* At all events, he might properly be called on to return it, which is all the plaintiff has done.

W. H. Watson in support of the rule.—This is a case quite different from those cited; for both writs having been lodged with the sheriff's deputy, at his office in *London*, pursuant to 3 & 4 *W.* 4. c. 42. s. 20.

(*a*) See *Russell* v. *Dickson*, 6 Bing. 442. (*b*) 6 Taunt. 370.
(*c*) 2 D. & R. 193.

the last countermanded the first in the absence of any order that it should not so operate. Lord *Arundel* v. *Chitty* (*a*) shows, that if the defendant were in custody in *Bedfordshire* on any other process, at the suit of any plaintiff soever, he would be in custody at suit of every plaintiff who has lodged a writ at the sheriff's *London* office. So that had the sheriff seized the goods in *Bedfordshire* under the *fi. fa.* on the 25th *April*, before he could possibly have heard of the lodging of the *ca. sa.* on that day in *London*, he would nevertheless have been a trespasser. [*Parke* B. You do not dispute that both writs may be issued and delivered together: yet the inconvenience arises equally in that case. The plaintiff might, at all events, sue the sheriff for negligence in not executing the *fi. fa.* in the time which elapsed between his receipt of it and the issuing the *ca. sa.*] The sheriff has till the return of the writ to execute the *fi. fa.* [*Parke* B. No; he would be liable for not taking the goods before the return-day, if he had opportunity to do so, and the bankrupt afterwards and before the return-day became bankrupt. Lord *Abinger* C. B. A return of *nulla bona* would not be justified by proof that the defendant had no effects on the seventh day, if he had them on a previous day.]

Lord ABINGER C. B.—Whether a *ca. sa.* issued subsequently to a *fi. fa.* and before levy thereon, operates as a countermand of it, is not here the question. If the sheriff thought it did so operate, he might have returned accordingly, and that point might be determined; but he was clearly bound to return the *fi. fa.*, for his first impression that the defendant had no goods was incorrect. In this case, the issue of the *ca. sa.* was occasioned by the sheriff himself; but, were

(*a*) 1 Dowl. P. C. 499.

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that otherwise, a sheriff must in common sense infer that the plaintiff's object would be to obtain his demand by executing the *fi. fa.*, rather than by taking the debtor's person under the *ca. sa.* The rule must be discharged with costs.

PARKE B.—Whether the lodging a *ca. sa.* in the *London* office of a sheriff may or may not be a supersedeas of a former writ of *fi. fa.* need not here be decided. In this case the sheriff had time to execute the *fi. fa.*, and goods of the defendant existed which he might have taken. The plaintiff is entitled to take advantage of that default by suing the sheriff.

BOLLAND B.—*Miller* v. *Parnell* clearly shows that a plaintiff may have both writs concurrently, so as to avail himself of one or other, according to circumstances, for the sheriff having both may execute either; *Prinnose* v. *Gibson*. Nothing was here done to deprive the plaintiff of the benefit of executing the *fi. fa.* When he issued the *fi. fa.* he did not desire the sheriff not to execute the *ca. sa.* if he could; and when he withdrew the *ca. sa.* the *fi. fa.* was left to its ordinary effect.

GURNEY B. concurred.

Rule discharged with costs.

See as to concurrent writs, *Hodgkinson* v. *Walley*, *ante*, Vol. II. 174. as remarked on by *Parke* B. in *Lewis* v. *Morris and Another*, Vol. IV. 914.

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RAYMOND and Another, Executors of WALFORD, *against* FITCH.

T. W. demised premises to the defendant, subject to a covenant by him not to fell, stub up, lop or top the timber trees, excepted out of the demise; a breach of this covenant having been committed in his lifetime:—Held, that his executor could maintain covenant against the lessee.

COVENANT. The declaration stated, that whereas theretofore, to wit, on 5th *Dec.* 1832, by a certain ıdenture then made between the testator *Walford* of ıe one part, and the defendant of the other part, (pro- ırt,) the testator did demise and to farm let to the ·fendant certain buildings, lands, and premises, &c. have and to hold the same for a year from 29th *pt.* then last, and so from thence from year to year. ıd the said defendant for himself, his executors and ministrators, did by the said indenture covenant, pro- ıe, and agree to and with the said testator, his heirs l assigns, amongst other things, that the said de- ıdant should not nor would, during the continuance the said demise, fell, stub up, head, lop or top any of : timber trees or trees likely to be timber, growing being on the said demised premises; or cut or take ay wood or bushes, lops or tops, except such as had en agreed to be allowed for firewood; and upon lop- ıg the pollard trees, and cutting down the stub wood owing in or about the said hedges and ditches of the id demised premises, should at the same time new ake and scour the said ditches, and lay one spit of all e earth of the said ditches on the banks thereof, to urish the quickset there, as in and by the said in- ·nture, reference being thereunto had, will more lly and at large appear. The declaration then stated e defendant's entry on the demised premises in the etime of the testator, and his being possessed thereof · the term demised to him; and after averring general rformance by the testator in his lifetime, as well as by e plaintiffs as executors since his death, and general n-performance by the defendant, assigned the fol-

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lowing breach. And the said plaintiffs executors as aforesaid say, that the said defendant after the making the said indenture, and during the term thereby granted, and before the decease of the said testator, to wit, on &c. and on divers other days and times between that day and the day of the decease of the said testator, to wit, on 1st *Jan.* 1833, felled, stubbed up, headed, lopped and topped divers, to wit, 500 of the timber trees, and 500 trees likely to become timber, growing and being on the said demised premises, and of great value, to wit, of the value of 20*l.*; and during the time aforesaid, he the said defendant cut and took away divers, to wit, 500 cart loads of wood, bushes, lops and tops, of the value of 20*l.*, the same being other and different wood, bushes, lops and tops than such as had been agreed to be allowed for firewood, contrary to the form and effect of the said indenture, and of the covenant of the said defendant so by him made in such behalf as aforesaid. The second breach assigned was—and the said plaintiffs, executors as aforesaid, in fact, further say, that the said defendant did not nor would, upon such lopping the said trees, and cutting down the said wood and bushes growing in and about the said hedges and ditches of the said demised premises, new make or scour the said ditches, or lay one spit of all the earth of the said ditches on the banks thereof to nourish the quickset there, according to the tenor and effect of the said indenture, and of the said covenant of the said defendant, so by him made in such behalf as aforesaid; but therein wholly failed and made default, contrary to the form and effect of the said indenture, and of the said covenant of the said defendant, so by him made in such behalf as aforesaid.

The defendant, after setting out the deed on oyer, demurred generally to the first breach, except as to so much thereof as related to taking away the said bushes,

wood, lops and tops therein mentioned; and to the part excepted, pleaded accord and satisfaction; and as a further plea, that he did not take away any wood or bushes. To the second breach he also demurred generally.

Sir *William Follett* in support of the demurrer. The plaintiffs cannot sustain this action for want of an averment that damage resulted to the personal estate of the testator from that injury to the real estate, which they have alleged. In *Kingdon* v. *Nottle* (*a*), the plaintiff, as executrix, declared that the defendant, by lease and release, conveyed to the plaintiffs' testator lands in fee, with a proviso for redemption on payment of a fixed sum; and covenanted with him, that he the defendant was, at the execution of the deed, seised in fee, and had a right to convey. The breach assigned was, that the defendant was not seised in fee, &c. and had not a right to convey; but no special damage to the testator in his lifetime being shown, nor any claim to the premises by the plaintiff appearing, Lord *Ellenborough* said, "in the absence of any damage to the testator, which, if recovered, would properly form part of his personal assets, I do not know how to say that this action is maintainable." It is submitted that if a man dies from being overturned in a coach, his executor could not recover for the breach of contract to carry safely, though he might for the expense incurred in attempting a cure. [*Parke* B. *Kingdon* v. *Nottle* went on the ground that no damage appeared, and the breach was nominal; whereas in this case the damage to the trees and land was one for which the testator might have sued in his lifetime. The lessor was injured by the cutting down the trees, and the

(*a*) 1 M. & Sel. 355.

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question is, whether his right to compensation for the injury should not go to his executors.] The authorities cited in *Kingdon* v. *Nottle* show that it does not. Thus, in *Fitzherbert's Natura Brevium* 145 (C.) it is laid down, "If a man make a covenant by deed to another and his heirs, to enfeoff him and his heirs of the manor of D.; now if he will not do it, and he to whom the covenant is made, dieth, his heir shall have a writ of covenant upon that very deed." So, in *Shepard's Touchstone*, 171. we find, "If a feoffment be made in fee, and the feoffor doth covenant to warrant the lands or otherwise to the feoffee and his heirs; in this case, the heir of the feoffee shall take advantage of this:" and further, "If *A.*, *B.* and *C.* have lands in coparcenary, and purchase other lands in fee, and covenant each to the other, his heirs and assigns, to make such a conveyance to the heir of him that shall die first, of a third part as he shall devise, in this case, the heir, not the executor, shall take advantage of the covenant." Then this right of action for a matter affecting the realty went to the heir and not the executor. It is an issue in fact between the parties, whether the trees were taken away in the lifetime of the testator, as the plaintiffs have averred; but the cutting the trees is all which is before the court. *Jones* v. *King* (a) shows, that the heir might have sued now; then the heir and the executor cannot both be entitled to sue for the same breach. In *Chamberlain* v. *Williamson*, Lord *Ellenborough* said, "The general rule of law is *actio personalis moritur cum personâ*, under which are included, all actions for injuries merely personal. Executors and administrators are representatives of the temporal property, that is, the debts and goods of the deceased, but not of their wrongs, except where those

(a) 4 M. & Sel. 188.

wrongs operate to the temporal injury of their personal estate. But, in that case, the special damage ought to be stated on the record, otherwise the court cannot intend it." [*Parke* B. That action was within the maxim of law there cited, being only an injury to the feelings of the deceased. But *Morly* v. *Polhill* (*a*) is expressly in point in support of the first breach here assigned. The plaintiff *Morly* sued as executor to the late Bishop of *Winchester*, and stated in his declaration that *Brian*, the bishop's predecessor, had demised a rectory and certain lands to *J. S.* for 21 years, who had assigned it to the defendant's testator, and that the lessee covenanted with *Brian* and his successors to repair the chancel of the church, and the barns, &c., and assigned as a breach the not repairing by the testator of the defendant in the lifetime of the plaintiff's testator, and that the lease afterwards expired. The court held, that the action would lie for the breach in the testator's lifetime. There is a covenant to repair in this case as well as in that.] That case would not be law unless it will bear the construction that the act of the defendant's testator necessarily injured the personal estate of the plaintiff's testator. [*Parke* B. It may have been decided on the ground that the executor of the bishop who sued would be liable to the incoming bishop for dilapidations, by the custom of *England* (*b*). The bishop would be liable to repair the chancel as rector; so that neglect to do so would damage the personal estate of the deceased bishop.] Each breach is here separately demurred to, and one question raised is, on what authority an executor can sue at all for the breach of a covenant not to cut trees,

(*a*) 2 Vent. 563: Salk. 109; cited Com. Dig. tit. Covenant (B. 1).

(*b*) See this custom stated in Degge's Parson's Counsellor, p. 138. pl. 94. cited *Wise* v. *Metcalf*, 10 B. & C. 301.

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committed in the lifetime of his testator? It is laid down in *Com. Dig.* tit. *Administration* (B 13), that by the equity of the statute 4 *Edw.* 3. c. 11. an executor or administrator may have every action for a wrong done to the personal estate of his testator; for example, of covenant, upon a covenant made to his testator for a personal thing. For this, *Latch*, 168, is cited by *Comyns* in two places. So an executor may sue upon a contract made to the testator, for which is cited *March's* R. pl. 23. But *Mordant* v. *Thorold* (a), is a contrary authority. Now the common law maxim of *actio personalis moritur cum personâ*, applies equally to an action of contract as of tort; and an executor's right to recover in any case, is on statutes only, where the testator's personal estate has been of necessity injured by the act complained of, and that injury is averred in the declaration, as was done in *Knights* v. *Quarles* (b). *Orme* v. *Broughton* (c) was an action brought by the administrator of the vendee of an estate, who had died after the time fixed by the contract of sale for completing the title by the vendor, and before it was completed. He sought to recover interest on the sum deposited at the sale, and the expense of endeavouring to procure the title. *Tindal* C. J. said, "the only question is, whether we can see on this record a personal contract, a breach of it in the time of the intestate, and a loss to his personal property. If these three circumstances concur, our judgment must be for the plaintiff." He afterwards observed, "this is an action, not by the intestate, but by his administrator; and we have still to see whether there has been any injury to the testator's personal property:" and after examining the terms of the de-

(a) Salk. 252. *S. C.* Carth. 135. cited 2 M. & Sel. 410.
(b) 2 Br. & B. 102; 4 Moore, 532, *S. C.*
(c) 10 Bing. 533.

charation, added, "that is an injury to the personal property of the intestate which brings the case within *Kingdon* v. *Nottle*." *Lucy* v. *Levington* (*a*) will be cited in support of the action: but as the testator was in that case evicted, his personal estate must have been damaged by loss of the profits of the demised premises. The cutting trees by a tenant does not necessarily injure his lessor's personal estate: nay, it must be taken that it benefits it, for the lessor might have sold the timber without losing his action against the defendant for cutting it down. Had damage to the personal estate been averred, it might have been traversed and tried by a jury. The covenant to new make and scour ditches, &c., is clearly to do something for the benefit of the real estate, and the same objection applies. That the heir only could sue, need not here be argued.

W. H. Watson for the plaintiff. Unless this action is maintainable by the executors, no other person could sue; for the breach was wholly in the lifetime of the testator, and the covenant is not continuing. But where the covenant relates to realty, and the ultimate breach is in the lifetime of the lessor, his executor may sue; damage to the personal estate need not be stated, as has been argued. But such damage does in fact exist here, for as on the oyer craved, it appears that the trees were excepted out of the demise, the further yearly growth of the trees, as well as their shade, fruit, loppings, and other profits, were lost to the testator (*b*). [*Parke* B. It is the same as if the covenant had been not to cut down trees in another place.] *Morly* v.

(*a*) 2 Lev. 26; *S. C.* 1 Ventr. 175; 2 Keble, 831. See this case stated Com. Dig. tit. Covenant, (B 1); Bac. Abr. Executors and Administrators, (N); and relied on by the court in 1 M. & Sel. 366; 10 Bing. 538.

(*b*) See Com. Dig. tit. Biens (H); 11 Co. 52 a.

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Polhill (a) cannot be got rid of, for the reasons suggested; for the dilapidations complained of accrued in the time, not of the bishop whose executor sued, but of the former bishop; and if so, it is not clear that he would be liable for them to his testators's successor. The ground stated for that decision was, that the breach was in the testator's lifetime. That case is thus stated in *Comyns's Digest*, tit. *Covenant*, (B 1.) "If a man covenants with a bishop and his successors to repair a rectory demised, the executor of the bishop may have covenant for a breach in his lifetime." *Lucy* v. *Levington* (b) is an authority acknowledged by all the cases. The plaintiff declared that *Levington* sold to *Lucy*, the plaintiff's testator, certain lands, and covenanted with him, his heirs and assigns, that he should enjoy the same against him (*Levington*) and *Vanlore*, their heirs and assigns, and all claiming under them, and assigned as a breach that *Cooke*, claiming under *Vanlore*, ejected the plaintiff's testator; and the court held, "that the eviction being to the testator, he cannot have an heir or assignee of this land, and so the damages belong to the executors though not named in the covenant, for they represent the person of the testator." Thus the destruction of the trees in the testator's lifetime occasioned a damage resulting to the executors on his death. An argument may be raised in favour of maintaining this action of covenant, from the legislature not having provided for it in 3 & 4 *W*. 4. c. 42. s. 2. when empowering executors to sue for injuries to real estates committed in the lifetime of their testators. Lord *Ellenborough* rests the decision in *Chamberlain* v. *Williamson* on the breach of promise of marriage being a personal

(a) 3 Salk. 109; 2 Ventr. 56.

(b) See as to this case, *ante*, p. 991. note.

rong. In *Kingdon* v. *Nottle* (*a*), there was a continu-
ıg breach of the covenant in the time of the devisee
ı fee of the land, and it was therefore held that the
ction lay by him. Here, as by the destruction of the
ees, the ultimate damage accrued in the testator's life-
me, no other party can sue. [Lord *Abinger* C. B. It is
ue the testator might have himself cut down the
ees, but if that right had been of any value to his
ersonal estate, should it not have been alleged in the
eclaration? *Parke* B. The effect of the defendant's
ovenant is not to enter the testator's close and cut
ees there.]

Cur. adv. vult.

In *Michaelmas* term 1835,

Lord ABINGER C. B. delivered the judgment of the
ourt. After stating the pleadings, his lordship con-
nued,—The demurrer to the first breach gives rise
› the question, whether an executor can sue for a
reach of a covenant not to fell, stub up, head, lop or
ıp timber trees excepted out of the demise, such
reach having been committed in the time of the testa-
ır, and no part of the timber, loppings, or toppings
ppearing to have been removed by the defendant.

This question was argued in the latter part of last
ırm before my brothers *Parke*, *Bolland*, *Gurney*, and
ıyself, and stood over that we might more attentively
onsider how far the modern decisions referred to on
he argument had overruled or qualified the old au-
horities.

Those authorities are uniform, that the personal
epresentative may sue, not only for all debts due to
he deceased, by specialty or otherwise, but for all
ovenants, and indeed all contracts with the testator,

(*a*) 4 M. & Sel. 53. See the former decision when the executrix sued, M. & Sel. 355.

me, and the reason appears to be,
ses in action, and are parcel of the
respect of which the executor or
sents the person of the testator, and
tor's assignee. And this right does
equity of the statute 4 *Edw.* 3. c. 7.,
law right, as much as the right to sue
ecuity for a sum certain due in the
The maxim, that "*actio personalis*
" is not applied in the old autho-
actions on contracts, but to those on
unded on malfeasance or mis-
r property of another, and are
n, and die with it, except where
the personal representative by

actions of covenant, will be
its. *Administrat* B 13,
ement tit. *Executors and*
the cases of *Mason* v.
which was the case
deceased bishop, for
repair in a
in which
on a breach
arging the land
Lerington (*d*),
reach in his tes-
ment. The old
will lie upon
der seal. In
said, "That it
soever there is

Salk. 199, pl. 10.
Vent. 176.

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ıtract made to the testator or intestate, or any which ariseth by contract, there an action will ɔr the executor or administrator; but personal ns die with the testator or intestate; and in *Pin-s* case (*a*), in which the question was, whether an n of assumpsit for payment of a debt lay against xecutor, it is laid down as follows: "As to the objection, that this personal action of trespass ıe case *moritur cum personâ*, although it is termed ass, in respect that the breach of promise is al-l to be mixed with fraud and deceit, to the special ıdice of the plaintiff, and for that reason it is d trespass on the case; yet that doth not make action so annexed to the persons of the parties, it shall die with the persons, for then, if he to n the promise is made dies, his executors should have any action, which no man will affirm; and an n sur assumpsit, upon good consideration, without ıalty, to do a thing, is no more personal, *i. e.* an-d to the person, than a covenant by specialty to ıe same thing," and in *Bacon's Abridgement*, tit. *cutors* (N a), "An executor stands in the place is testator, and represents him as to all his per-l contracts, and therefore may regularly maintain action in his rights which he himself might."

hese authorities have certainly been limited by ern decisions, quoted in the argument, and are to nderstood with some qualifications, but it will be d th[illegible] none of these qualifications affect the pre-

[illegible] hat the executor may sue upon every [illegible] his testator, broken in his lifetime, has [illegible] qualified [illegible] decisions in the two [illegible]*gdon* v. [illegible] followed by that of

[illegible] a. [illegible] & S. 355, and 4 Id. 53.

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King v. *Jones* (*a*), in which cases it was held, that where there are covenants real, that is, which run with the land, and descend to the heir, though there may have been a formal breach in the ancestor's lifetime, yet if the substantial damage has taken place since his death, the real representative, and not the personal, is the proper plaintiff. These cases go no further, and they do not apply to the present; for there is no doubt but that the covenant in question is purely collateral, and does not run with the land, for the trees being excepted from the demise, the covenant not to fell them, is the same as if there had been a covenant not to cut down trees growing upon an adjoining estate of the lessor. It is a security by specialty given by the lessee to the lessor, not to commit such a trespass during the lease, which may continue beyond the lessor's life. For the breach of such a covenant after the death of the covenantee, the heir or devisee of the land on which the trees grew could not sue; the executor would be the proper party, as the covenant is collateral, and not intended to be limited by the life of the covenantee; and if he could not sue, no one could. It is equally clear, that the heir or devisee could not sue for a breach of the covenant in the time of the ancestor or devisor, and the executor, therefore, must sue, or all remedy is lost. These decisions, therefore, do not affect the present case.

The old authorities, with respect to the right of the personal representatives to sue on all contracts made with the deceased, have also been qualified by the modern decision of *Chamberlain* v. *Williamson* (*b*), in which it was held that the administrator of a woman

(*a*) 5 Taunt. 418; and 1 Marsh. 107. (*b*) 2 M. & S. 408.

could not sue for a breach of contract to marry the intestate, the declaration not stating any ground of injury to the personal estate; and in giving judgment, Lord *Ellenborough* enumerates other instances of contracts, the breach of which imports a damage only to the person of the deceased, such as implied contracts by medical practitioners to use a proper portion of skill and attention; which cases are, in substance, actions for injuries to the person, and for which the personal representative could not sue. And the argument on the part of the defendant in this case was, that the same limitation of the old authorities must be applied to all contracts, except such as directly relate to the personal estate, the performance of which would necessarily be a benefit, and the breach a damage to the personal estate of the testator, whether such contracts are under seal or not; and that upon such contracts the executor could not sue, without alleging a special damage to the personal estate. The case certainly does not go that length: and we think that such an extension of the doctrine laid down in it, is not warranted by law, and that it cannot be extended to a contract broken during the lifetime of the deceased, the benefit of which, if it were yet unbroken, would pass to the executor as part of the personal estate; at all events, not to such a contract under seal. The present case is one of that description. It is a case more favourable to the executors than those of *Morly* v. *Polhill*, *Smith* v. *Simonds*, and *Lucy* v. *Levington*, in which the covenant did run with the land; and if the last case is to be considered as having been decided, as was suggested in the argument before us, on the ground that the loss of rents and profits by an eviction of the testator, was an injury to the personal estate, (though such a ground is not intimated in either

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report) it is difficult to say that the loss of the shade and casual profits of the trees is not equally so.

We therefore think that judgment must be for the plaintiff.

Judgment for the plaintiff.

SWAINE and Others, Assignees of a Bankrupt, *against* LEWIS.

Where written notice of the dishonour of a bill has been given to the party sued, it is unnecessary to give him notice to produce that notice, in order to adduce secondary evidence of the notice of dishonour.

ASSUMPSIT. The plaintiffs sued the defendant as drawer of a bill of exchange indorsed to the bankrupt before his bankruptcy. The cause was tried in the sheriff's court of *London*, before Mr. Serjeant *Arabin*. Notice of dishonour was proved to have been sent to the defendant in proper time, in a letter put into the post, directed to the defendant at his residence, as stated in the bill. The letter stated that the bill had been "returned unpaid;" but no notice had been given to the defendant to produce that letter. The terms of the letter had been entered in the plaintiffs' book at the time of sending it; the plaintiffs proposed to read them from the book. The defendant's counsel objected to it, on the ground that the defendant had not had such notice as would entitle the plaintiffs to give the secondary evidence. The learned serjt. overruled the objection, and the plaintiff had a verdict. *Mansel* having obtained a rule for a new trial,

Humfrey showed cause in last term, relying on *Kine* v. *Beaumont* (*a*), as expressly in point, to show that the copy of an original letter giving notice of the

(*a*) 3 Brod. & B. 288; 7 Moore, 112, S. C.

dishonour of a bill is admissible in evidence for the plaintiff, if made at the time of sending the letter, without giving notice to produce the original. That case proceeded on *Ackland* v. *Pearce* (*a*), and *Roberts* v. *Bradshaw* (*b*).

Mansel in support of the rule. No copy of the notice of dishonour made at the time was here produced, so as to make it a kind of duplicate original (*c*); but an entry only was spoken to by a witness. *Kine* v. *Beaumont* is contrary to many of the earlier decisions; *e. g. Langdon* v. *Halls* (*d*), *Shaw* v. *Markham* (*e*), *Philipson* v. *Chace* (*f*). The original notice being the best evidence, the defendant should have had notice to produce it, before secondary evidence could be received (*g*). He also mentioned *Solarte* v. *Palmer* (*h*). [*Parke* B. That case has no bearing on the present.]

Lord ABINGER C. B.—As this is a point of general importance, and the case of *Kine* v. *Beaumont*, though not perhaps considered as altogether satisfactory, ought not to be overturned, except on argument in a court of error, we will take time to consider the point, and consult the other judges on it.

Cur. adv. vult.

In this term the judgment of the court was delivered by

(*a*) 2 Camp. 601. (*b*) 1 Stark. C. N. P. 28.
(*c*) *Jory* v. *Orchard*, 2 B. & P. 39; *Anderson* v. *May*, id. 237.
(*d*) 5 Esp. C. 156. (*e*) Peake's Cases, 165.
(*f*) 2 Camp. 110. (*g*) See Starkie's Evidence, tit. Notice.
(*h*) *Ante*, Vol. I. 371; *S. C.* in error, 1 Bing. N. C. 194. And see as to *Kine* v. *Beaumont*, *Colling* v. *Treweek*, 6 B. & Cr. 394, 398.

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Lord ABINGER C. B.—The question in this case was, whether, in an action on a bill of exchange against the drawer, or indorser, when it became essential to prove notice of dishonour, and it appeared that such notice was given by letter, it was necessary to give a notice to produce such letter before secondary evidence of its contents could be given. The case in the Common Pleas of *Kine* v. *Beaumont* was discussed before us: it was there decided, after consideration and conference with some other of the judges, that notice to produce a notice was not necessary, and particularly in such a case as this. All the judges have met, and after conferring together on the point, consider it best to adhere to the opinion expressed in the Common Pleas. It will now, therefore, be taken as settled, that it is unnecessary to give a notice to produce a notice of dishonour of a bill of exchange, in order to prove the latter notice by parol evidence.

Rule discharged.

GOODAY *against* CLARK.

In a *qui tam* action brought under 7 & 8 *G*. 4. c. 53. s. 9. to recover penalties against the defendant for voting at an election for members of parliament, being an officer of excise; the proof was, that at the time of voting the defendant kept an inn, over the door of which the words "Excise Office" were painted in large letters. That at the previous registration of voters, his name was objected to, and on being called on to produce his commission, he produced to the revising barrister "something framed and glazed like a picture;" that it had been once seen by a witness, was partly written and partly printed, and authorized the defendant to collect duties of excise. That he had received entries of buildings, &c. as required by the excise laws before the passing 4 & 5 *W*. 4. c. 51. but after receiving notice of that act, ceased to do so:—Held, that this was not sufficient evidence for a jury, that at the time of voting, which was after the passing of 4 & 5 *W*. 4. c. 51. he was an "officer of excise," within the meaning of 7 & 8 *G*. 4. c. 53. s. 9.

Whether since 4 & 5 *W*. 4. c. 51. the keeper of an excise office is such an officer of excise within the meaning of 7 & 8 *G*. 4. c. 53. s. 9. as will be liable to penalties for voting at an election of a member of parliament, *quære*. *Semble*, that he is not.

DEBT on stat. 7 & 8 *G*. 4. c. 53. sect. 9. The declaration (*qui tam*) stated, that heretofore, and after the passing of a certain act of parliament made

and passed in a certain session of parliament, held in the 2d & 3d years of the reign of his present majesty, intituled, "An act to amend the representation of the people of *England* and *Wales*;" and also after the passing of a certain other act of parliament made and passed in the same session of parliament, and intituled "An act to settle and describe the divisions of counties, and the limits of cities and boroughs in *England* and *Wales*, in so far as respects the election of members to serve in parliament;" to wit, on the 30th day of *December* 1834, a certain writ of our said lord the now king, under the great seal of *Great Britain*, issued out of his said majesty's Court of Chancery, (the said court being then and still holden at *Westminster*, in the county of *Middlesex*,) directed to the then sheriff of the county of *Suffolk*; by which said writ, after reciting that by the advice and assent of his majesty's council, for certain arduous and urgent affairs concerning his majesty, the state, and the defence of his said majesty's said united kingdom, and the church, his said majesty had ordered a certain parliament to be holden at his said majesty's city of *Westminster*, on the 19th day of *February* then next ensuing, and there to treat and have conference with the prelates, great men, and peers of his said majesty's realm, his said majesty did command and strictly enjoin the said sheriff that (proclamation thereof and of the time and place of election being first duly made for the said county,) four knights of the most fit and discreet, girt with swords, (that is to say) two knights for each division of the said county, and for each of the boroughs of *Ipswich*, *Sudbury*, and *Bury St. Edmund's*, in the said county, two burgesses; and for the borough of *Eye*, in the same county, one burgess, of the most sufficient and discreet, freely and indifferently by those who at such election should be present, according to

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SWAINE and Others v. LEWIS.

Lord ABINGER C. B.—The question in this case was, whether, in an action on a bill of exchange against the drawer, or indorser, when it became essential to prove notice of dishonour, and it appeared that such notice was given by letter, it was necessary to give a notice to produce such letter before secondary evidence of its contents could be given. The case in the Common Pleas of *Kine* v. *Beaumont* was discussed before us: it was there decided, after consideration and conference with some other of the judges, that notice to produce a notice was not necessary, and particularly in such a case as this. All the judges have met, and after conferring together on the point, consider it best to adhere to the opinion expressed in the Common Pleas. It will now, therefore, be taken as settled, that it is unnecessary to give a notice to produce a notice of dishonour of a bill of exchange, in order to prove the latter notice by parol evidence.

Rule discharged.

GOODAY *against* CLARK.

In a *qui tam* action brought under 7 & 8 *G.* 4. c. 53. s. 9. to recover penalties against the defendant for voting at an election for members of parliament, being an officer of excise; the proof was, that at the time of voting the defendant kept an inn, over the door of which the words "Excise Office" were painted in large letters. That at the previous registration of voters, his name was objected to, and on being called on to produce his commission, he produced to the revising barrister "something framed and glazed like a picture;" that it had been once seen by a witness, was partly written and partly printed, and authorized the defendant to collect duties of excise. That he had received entries of buildings, &c. as required by the excise laws before the passing 4 & 5 *W.* 4. c. 51. but after receiving notice of that act, ceased to do so:—Held, that this was not sufficient evidence for a jury, that at the time of voting, which was after the passing of 4 & 5 *W.* 4. c. 51. he was an "officer of excise," within the meaning of 7 & 8 *G.* 4. c. 53. s. 9.

Whether since 4 & 5 *W.* 4. c. 51. the keeper of an excise office is such an officer of excise within the meaning of 7 & 8 *G.* 4. c. 53. s. 9. as will be liable to penalties for voting at an election of a member of parliament, *quære*. *Semble*, that he is not.

DEBT on stat. 7 & 8 *G.* 4. c. 53. sect. 9. The declaration (*qui tam*) stated, that heretofore, and after the passing of a certain act of parliament made

and passed in a certain session of parliament, held in the 2d & 3d years of the reign of his present majesty, intituled, "An act to amend the representation of the people of *England* and *Wales*;" and also after the passing of a certain other act of parliament made and passed in the same session of parliament, and intituled "An act to settle and describe the divisions of counties, and the limits of cities and boroughs in *England* and *Wales*, in so far as respects the election of members to serve in parliament;" to wit, on the 30th day of *December* 1834, a certain writ of our said lord the now king, under the great seal of *Great Britain*, issued out of his said majesty's Court of Chancery, (the said court being then and still holden at *Westminster*, in the county of *Middlesex*,) directed to the then sheriff of the county of *Suffolk*; by which said writ, after reciting that by the advice and assent of his majesty's council, for certain arduous and urgent affairs concerning his majesty, the state, and the defence of his said majesty's said united kingdom, and the church, his said majesty had ordered a certain parliament to be holden at his said majesty's city of *Westminster*, on the 19th day of *February* then next ensuing, and there to treat and have conference with the prelates, great men, and peers of his said majesty's realm, his said majesty did command and strictly enjoin the said sheriff that (proclamation thereof and of the time and place of election being first duly made for the said county,) four knights of the most fit and discreet, girt with swords, (that is to say) two knights for each division of the said county, and for each of the boroughs of *Ipswich*, *Sudbury*, and *Bury St. Edmund's*, in the said county, two burgesses; and for the borough of *Eye*, in the same county, one burgess, of the most sufficient and discreet, freely and indifferently by those who at such election should be present, according to

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At the trial before *Vaughan* J. at the last *Suffolk* assizes, an examined office copy of the writ for the election, and the sheriff's return to it, was produced. A clerk from the office of the clerk of the peace for *Suffolk* produced the poll-book containing the defendant's name; the poll-clerk at the booth proved that, on the day laid in the declaration, the defendant tendered his vote for certain candidates at the election for *West Suffolk*, and that he kept the *White Horse* in *Sudbury*, over the door of which was the defendant's name, and the words "Excise Office" painted in large letters on a board. The voting was also proved by another witness, according to the act. The defendant was then proved to have received entries of places for selling beer, and rooms for keeping exciseable articles, even after the passing of 4 & 5 *W.* 4. c. 51. in *August* 1834: by which act, the duty of receiving entries was transferred to the district surveyor of excise. That officer gave parol evidence of the defendant's commission (*a*), it not being produced by him on notice. He had seen it, and said, it

(*a*) Copy Appointment of Excise Office Keeper.

To all to whom these presents shall come, greeting. Know ye that we whose names are hereunto set and seals fixed, being the major part of the chief commissioners and governors for the management of the receipt of excise, and other duties put under our management and receipt, in pursuance of the powers and authorities to us given, have constituted, deputed, and appointed, and by these presents do constitute, depute, and appoint *John Clark* to be our deputy agent and officer, for keeping of the office of excise, at the sign of the *White Horse* in the town of *Sudbury*, within the county of *Suffolk*; and for the receiving of all entries to be made by all common brewers, distillers, rectifiers, victuallers, innkeepers, alehouse-keepers, and other sellers and retailers of beer, ale, cyder and perry, sweets, and of all other exciseable liquors, makers of vinegar, sweets, metheglin and mead for sale; and also by all maltsters and makers of malt, hop planters, and by all makers of candles, soap, starch, paper, pasteboard, millboard and scaleboard, and by all printers, painters, and stainers of paper, and by all printers, painters, and stainers of silks, calicoes, linens, and stuffs; tanners, tawers, curriers, and dressers of hides and skins, and pieces of hides and skins, makers of vellum and parchment; and by all sellers of or dealers in brandy, of tea, makers of glass, makers of bricks and tiles, and by all dealers

was partly written and partly printed, and appointed the defendant to receive duties of excise. In *October* 1834, witness directed the defendant to discontinue to receive the entries, which he the defendant accordingly ceased to do: so that he had nothing to do with collecting or receiving the excise duties, that duty being performed by the witness after *October* 1834; but continued to suffer the collector to attend and receive the duties at his house eight times a-year, receiving no remuneration from the excise for so doing or on any other account. The defendant, when called on for his commission before the revising barrister, at the registration for *Sudbury* in 1834, produced something framed and glazed like a picture. He was struck off the lists on that occasion. The plaintiff was nonsuited, with leave to enter a verdict for 500*l.* A rule nisi having been obtained last term,

Storks Serjt. *Wightman* and *Byles* showed cause in this term.—The plaintiff is bound to prove that the defendant was an officer of excise at the time of voting in *January* 1834. If he was one before the passing of

in and sellers of wine by wholesale and retail; and all other person and persons whatsoever, chargeable or to be chargeable with any duties that now are or hereafter may be under our receipt or management, or under the receipt and management of the commissioners of excise for the time being; and for the receiving of the duties on the commodities aforesaid, and for performing of all other matters and things touching the said duties, according to the several acts of parliament relating to the same. This our commission to continue and be in force during the pleasure of us the said commissioners, or the major part of us, or the commissioners of excise for the said duties, or the major part of them, for the time being.

In witness whereof we have hereunto set our hands and seals, the day of in the year of the reign of our sovereign lord, &c., and in the year of our Lord 18 .

A. B.
C. D. &c.

Entered, *W. S.*, Clerk of Securities.

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4 & 5 *W.* 4. c. 51. in the previous *October*, he was no longer such after that act passed in *October* 1834. The plaintiff relies on 7 & 8 *G.* 4. c. 53. sec. 9. which enacts that no commissioner or assistant commissioner of excise, or officer of excise, or person employed in the charging, collecting, or managing of any part of the revenue of excise, shall be capable of giving his vote for the election of any person to serve in parliament; and if he votes during the time he shall hold, or within two calendar months next after he shall have ceased to hold or execute any office or employment as aforesaid, his vote shall be void, and he shall for every such offence (proved on oath by two credible witnesses) forfeit 500*l.*, one moiety to the informer, and the other to the poor of the parish in which his offence is committed (*a*). But the system of collection and management which prevailed before *October* 1834, has given place to a new one. Under the old acts of 12 *Car.* 2. c. 23., and 15 *Car.* 2. c. 11. s. 9. a head office was fixed in *London*, as at present, with district officers in market towns, which were to be kept open a certain number of hours each day, in order to receive entries of buildings and utensils, and receipt of duties, &c. at such district offices. The nature of the employment imposed by these acts on the office keeper might have had the effect of making him an excise officer, had not the duty imposed on him of collecting duties been taken away by 7 & 8 *G.* 4. c. 53. s. 25. and s. 127, and his power to receive entries which was in part taken away by 53 *G.* 3. c. 15. s. 18, and 7 & 8 *G.* 4. c. 25. s. 15. was finally put an end to by 4 & 5 *W.* 4. c. 51. s. 5.

(*a*) By sec. 10 of the same act, no officer of excise or person employed in the collection or management of, or accounting for the revenue of excise, or any part thereof (*except* the keeper of an office of excise, as thereinafter mentioned,) shall, whilst he shall be such officer, or so employed as aforesaid, deal or trade in any commodities subject to any duties of excise, &c.

Thirdly, though 15 *Car. 2.* c. 11. s. 9. which directed him to attend at the excise office during certain hours, is unrepealed, still as that attendance was only to receive duties and entries, it has ceased to be his duty, and is transferred to the collector; then his attendance is superfluous; were this otherwise, he could not have been without salary. [Lord *Abinger* C. B. The mere act of the commissioners of excise in naming a party to receive duties and entries cannot deprive a man of his vote, without proof of his acting in the office. He may or may not be an officer of excise, but it does not follow from that act of the commissioners that he is. *Alderson* B. The officer proved that the defendant never collected the duties, and there is no evidence to contradict him. An authority enabling the defendant to collect duties of excise was the only evidence; is that sufficient, without showing his acceptance of that authority by acting on it? The parol evidence shows that he never did so collect or receive duties, and that his acting, even in receiving entries, had, before he voted, been put an end to by statute. *Bolland* B. Sect. 18 of 7 & 8 *G.* 4. c. 53. shows, that the act alludes not to an office keeper, but to riding officers.] The exemption in s. 10 (*a*), does not show that the office keeper is an "officer of excise," as described in s. 9; for being engrafted on the original words, *ex abundanti cautelâ*, it cannot increase their effect. Thus in *Smithett* v. *Blythe* (*b*), king's ships of war were excepted from paying toll, under words in an act which imposed it on "ships and vessels" passing a lighthouse, and it was held that the king's other ships were not chargeable by implication. Lord *Tenterden* said, "As the exception must be out of that which is previously granted, it cannot operate by in-

(*a*) *Ante*, p. 1006. (*b*) 1 B. & Adol. 509.

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tendment to impose a charge which the words of the grant are not extensive enough to comprehend. The exception cannot give a greater effect to the grant than its own terms admit of, and I think, therefore, that in exempting ships of war, which may have been done *ex majori cantelâ*, it does not impose a liability on other vessels of the crown." Again, *Serjeant's Inn*, which is within the city, is expressly exempted from the *Middlesex* Registry Act, 7 *Ann.* c. 20. s. 17., but that act is held not to apply to the city of *London*. To maintain so penal an action, a definite office, and an officer duly appointed, should have been proved. The *Oakhampton* Committee (*a*) decided in favour of the vote of an excise office keeper.

Talfourd Serjt., *B. Andrews*, and *Gunning* contrà. First, the defendant was an officer of excise before 4 & 5 *W.* 4. c. 51. passed. For an excise office keeper is appointed by the commissioners of excise, and is liable to dismissal. At his house were to be performed certain acts, made necessary by the excise laws. Nor is receipt of salary essential to constitute an office of profit, *Delane* v. *Hillcoat* (*b*); for profit may notwithstanding be the result of holding a particular office, as in this case, from the additional custom brought to the defendant's inn. But the excise office is still kept open for the usual hours, under the old acts, and must be so; for by 7 & 8 *G.* 4. c. 53. s. 108. and s. 110., goods subject to duties of excise, and seized on that account, must be deposited there, to be dealt with according to law. If so, there must be an office keeper. Looking at sect. 9. the office keeper is equally subject to the commissioners, as acknowledged officers of

(*a*) 1 Peck. Elect. Cases, 373; Rogers on Elections, 4th edit. 87.
(*b*) 9 B. & Cres. 310.

excise. He is therefore directly within the influence of the crown, against which the prohibition to vote is pointed. The proviso in sect. 10. would abundantly include an excise office keeper, if the legislature so intended, and the expression there used may be a key to that intention, without seeking to enlarge by it, as of necessity, the original enacting terms. That the intent may appear by the exception, is clear from *Fitzwilliams* v. *Fitzwilliams* (*a*). There, by a devise of all the testator's goods, plate, and jewels, except the lease of *F.*, all the testator's other leases were held to pass for the above reason. The circumstance, that the keeper of an excise office is usually a publican, on account of the excise business bringing customers to the house, explains the exception.

Secondly, the act 4 & 5 *W.* 4. c. 51. has not determined the defendant's office, though it has put an end to its duties. In *Stokes* v. *White* (*b*), it was argued that the privilege of a side clerk of this court to arrest an attorney of another court, ceased after the transfer by statute of a side-clerk's duties to other offices; but the court held, that the office notwithstanding continued to exist, and retained its accustomed privileges. [Lord *Abinger* C. B. Had that action been for a penalty, the act might not have been construed in that way. As it stood, it was sought to take away a privilege by a side-wind.] The question here is, not whether the duties have been handed over, but whether the office exists. The defendant still holds out that it does, and not being shown to have resigned it, must take the consequence.

Lord ABINGER C. B.—The court is called upon in this case to deal with two questions, in their nature

(*a*) Noy, 112; Dyer, 261 *b.* 27 n. (*b*) *Ante*, Vol. IV. 786, 798.

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wholly distinct. The first being the general question, whether the keeper of an excise office is ex necessitate rei an officer of excise. My first impression when this case was moved was, that under sect. 10. he must be taken to be so. That impression, however, has been in some degree removed by the argument, especially by the course taken by Mr. *Byles*, in commenting on the effect of the several statutes he has referred to, pointing out the various duties imposed upon the office keeper of an excise office by the older statutes, and those transferred from him to other persons by later enactments. But sufficient, at all events, appears upon the argument to raise a doubt, whether such a person is or is not an officer of excise. The defendant may or may not in fact be such an officer; it may appear that he is so by his commission when produced, or by proof of some duties he has to perform, or of some privilege he enjoys by virtue of it. But I think the evidence in this case is altogether inadequate to make it so appear. The proof amounts to this, that defendant keeps an inn, and has the words "excise office" over the door; that his vote had been rejected by the revising barrister, before whom something was produced, supposed to be his commission. Then the surveyor is called to describe the commission, of which he gives an imperfect parol account, not stating any one duty or privilege the party was bound to perform or entitled to claim by virtue of it. It does not appear by whom it was granted, whether by the crown or by the commissioners, or by the surveyor-general for the district. Then the only duty which we might infer that he would have to do as an officer of excise, and which might have made him an excise officer, he is proved to have ceased to perform since *October* 1834. I think, therefore, the plaintiff has failed to make out what he

was bound to do in order to charge the defendant. This is a highly penal statute in limitation of a franchise, and imposing most severe disabilities, and ought to be construed very strictly. No doubt the excise offices were originally kept by officers having many duties and privileges, *e. g.* of stopping carriages on suspicion. Again, this office may still be granted to a party being an officer of excise. But the plaintiff has failed to satisfy my mind, either on the general point or the point in this particular case, viz. that in the month of *January* 1835, when the defendant tendered his vote, he was in any situation which rendered him liable to the penalties of this act of parliament.

BOLLAND B.—I am of the same opinion. I give no opinion on the general question, but confine myself to the absence of sufficient proof against this defendant. It is not even proved clearly that he was himself the keeper of the office, but only that there was a board over his door, with the words "excise office" on it. It is shown, that in fact he does not collect the duties. But it is said, that after the proof here given of his commission, it must be taken that he continues to discharge its duties. I cannot assent to that, particularly on the construction of so highly penal and disqualifying an act. Moreover, the defendant was expressly directed by his superior officer, to cease to make entries after the 14th *October*. In the absence of satisfactory proof that he was in fact an officer of excise, I think the rule ought to be discharged.

ALDERSON B.—The only question is, whether, at the time of the defendant's voting on the 19th *January* 1835, the defendant was or was not an officer of excise. It certainly seems to have been considered, at the time of the passing of the 7 & 8 *G.* 4. c. 53., that the

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keeper of an excise office was an officer of excise, though that seems to follow from the terms of the exception in the tenth section. That was so provided, because he had then duties to perform, and if they have been taken away, it seems to follow that he no longer remains an officer of excise, within the meaning of the clause imposing a penalty. Upon that question I give no definite or distinct opinion, though my impression is as I have stated. But I think the proofs on the part of the plaintiff are defective. As to the board, I agree with my brother *Bolland*, that that does not even prove that the defendant kept the office, or that some one else did not keep it there. Then there is the loose evidence of what took place at the registration, and the surveyor's statement of his having read the commission, and of the defendant's having made entries; but the same witness proves also, that the defendant did not collect duties, and that since 4 & 5 *W.* 4. c. 51. his duty of receiving entries had ceased. The only proof of his keeping the office, is the proof of his acting as an officer, and that acting was proved to have ceased after 14th *October* 1834. The only result therefore is, that if he ever was an officer of excise, he ceased to be so on that day. I am very glad to be able to free the defendant from so severe a penalty and disqualification for doing that which a committee of the House of Commons has said he may do lawfully,

GURNEY B.—I give no opinion on the general question; it is sufficient to say, that if the plaintiff had a case for the jury, he has left it imperfect, and that under circumstances in which, by ordinary industry, he might have made it complete.

Rule discharged.

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DOE *dem.* SMITH and Another *against* FLEMING.

EJECTMENT brought on the several demises of *Charlotte Smith* and *Barbara Watkins*, to recover certain valuable estates, situate in the county of *Dorset*. The cause was tried at the last *Dorsetshire* assizes, when a verdict was taken for the plaintiff, subject to the opinion of the court upon the following case, with liberty to either party to turn it into a special verdict.

George Browne, by his will dated 6th *September* 1775, duly attested to pass real property, devised all his estate, including the premises which are the subject of this ejectment, (charged with a certain annuity,) to his daughter, *Susannah Browne*, for life, without impeachment of waste, with remainder to trustees to preserve contingent remainders; remainder to the first and every other son of the said *Susannah* in tail; remainder to the daughters of the said *Susannah* in tail; remainder over to testator's son, *F. J. Browne*, for life, without impeachment of waste; remainder to trustees to preserve contingent remainders; and remainder to the first and every other son of the said *F. J. Browne* in tail, and remainder to his daughters in tail; and the will then proceeds in the following words; "and for and in default of such issue, I give and devise the said manors, messuages, farms, &c. charged and chargeable as aforesaid, unto the younger branches of the family of *Brown Willis*, esq. of *Whaddon Hall*, in the county of *Bucks.*, lawfully begotten, and to their heirs for ever, to be equally divided between them,

G. B. by will devised his lands to his daughter for life, remainder to her sons and daughters successively in tail, remainder to his son for life, and his sons and daughters in tail; "and for default of such issue, to the younger branches of the family of *B. W.* and their heirs, to be equally divided amongst them as tenants in common; and in default of such issue to the elder branches of the family of *B. W.*" (in similar terms). At the time the will was made, two daughters of *B. W.* were living, one of them having four daughters living, the other being childless, and past child bearing. There were also an only son of *B. W.*'s eldest son, and an only son of his third son. The state of *B. W.*'s family remained the same at the death of the testator. But at the expiration of the last estate tail, 56 years afterwards, there were many descendants living of one of *B. W.*'s daughters, as also of his third son:—Held, that the devise was void for uncertainty, and that the remainder in fee, after the extinction of the estates tail, descended to the heir at law.

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share and share alike, and to take as tenants in common; and in default of such issue, I give and devise the said manors, &c. charged and chargeable as aforesaid, unto the elder branches of the family of the said *Brown Willis*, lawfully begotten, and to their heirs for ever, equally to be divided among them, share and share alike, and to take as tenants in common." The testator made five codicils to his will, but neither of them affected in any way the above devise. He died in *January* 1777. His daughter, *Susannah Browne*, died without issue in 1783; his son, *F. J. Browne*, died without issue in *March* 1833. *Brown Willis* had several children, both sons and daughters, and died in 1761. The only descendants of *B. Willis*, living at the date of the testator's will, were two daughters, namely, *Mary Hervey*, born in 1714, and *Alice Eyre*, born in 1715; and four daughters of *Mary Hervey*, viz. *Mary Adams*, born 1750, *Elizabeth Hervey*, born 1750, *Charlotte Smith*, one of the lessors of the plaintiff, born 1752, and *Barbara Watkins*, the other lessor of the plaintiff, born 1754; also *John*, who took the name of *Fleming*, born in 1749, being the only child of *Thomas*, the eldest son of *Brown Willis*, and *Thomas Willis*, born 1757, being the only child of *Henry*, the third son of *Brown Willis*. At the time of the death of the testator, in *January* 1777, the same persons were living, and in addition, *Jane Caroline*, the daughter of *Thomas*, the son of *Henry*, the third son of *Brown Willis*, born 1776. At the time of the death of the said *F. J. Browne*, all the above-mentioned persons were dead, except the two lessors of the plaintiff; the said *John Fleming* left no issue. The said *Thomas*, the son of *Henry*, third son of *Brown Willis*, left issue *John Willis Fleming*, and five daughters, *viz.* the said *Jane Caroline*, born 1776, (afterwards married to *Thomas Meyrick*,) *Charlotte Caroline*, born 1780, *Matilda*, born

1783, *Harriett*, born 1785, (now the wife of *Henry Metcalf Wardle*,) and *Julia*, born 1786, (late wife of *Edward Orlebar Smith*.) The said *John Willis Fleming* is now living, and hath issue *Honoria*, born 1814, *J. B. Willis*, born 1815, *Christophina Buchanan*, born 1818, *Thomas J. Willis*, born 1818, *Harriett Elizabeth*, born 1819, *Charlotte Jane*, born 1821, and *William Henry*, born 1823. The said *Jane Caroline Meyrick* died in 1805, leaving issue *Jane*, now the wife of *St. John Charlton*, born 1803, and the said *Jane Charlton* hath issue *Catharine*, *Louisa*, *Jane*, *St. John* and *Lucy*. *Charlotte Smith*, one of the lessors of the plaintiff, hath issue *Charlotte*, born 1781, *Jane Martha*, born 1785, *Eliza Diana*, born 1786, *Edward Orlebar*, born 1788, and *Penelope Marshall*, born 1793, *Charles Hervey*, born 1793, and *Boteler Chernocke*, born 1796. The said *Ann Penelope Marshall* hath issue *Charlotte Hervey*; the said *Charles Hervey*, the son of the said *Charlotte Smith*, the lessor of the plaintiff, hath issue *Charles Hervey*, *Francis Maria Dale*, *Charlotte*, *Julia*, *Elizabeth*, *Emma*, *Jemima*, *Barbara*, and *Villiers Chernocke*: and the said *Boteler Chernocke*, the other son of the said *Charlotte Smith*, the lessor of the plaintiff, hath issue *Boteler Chernocke*, *Charlotte Hervey*, and *Sarah Whilby*. All the above-named descendants of *Thomas*, the son of *Henry*, the third son of *Brown Willis*, and of *Charlotte Smith*, the lessor of the plaintiff, were living at the decease of the said *F. J. Browne*. The defendant is the second son of the said *J. W. Fleming*, and is also devisee in fee of the premises in question, under the will of the said *F. J. Browne*, who was the heir at law of the said testator *George Browne*.

The question for the opinion of the Court is, whether the lessors of the plaintiff are entitled to any and what part of the premises in question, under the will of the said *G. Browne*. If the Court should be of

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opinion, that the lessors of the plaintiff are not entitled to any part of them, the verdict is to be entered for the defendant; on the other hand, if the Court shall be of opinion that the lessors of the plaintiff are entitled to the whole, then the verdict is to stand; if to any part, then the verdict to be entered for such part.

Hodgson for the lessors of the plaintiff. The question is, what reasonable construction can be put on the devise in remainder to the younger and elder branches of the family of *Brown Willis*. I contend, that it gives the lessors of the plaintiff, as descendants of the survivors of the two daughters and younger children of *Brown Willis*, a vested remainder in tail, expectant on the determination of the particular estates of the daughter and son of the testator; whereas the defendant, who claims under the heir at law, says that the devise is void for uncertainty, and that consequently the property descended to the heir at law. The general rules of construction of wills, prevent a devise from being held altogether void for uncertainty, where the terms will bear a reasonable interpretation, though not attainable without difficulty. To use also the words of Mr. *Wigram*'s work on the interpretation of wills, "It must always be remembered, that the words of a testator, like those of every other person, tacitly refer to the circumstances by which, at the time of expressing himself, he is surrounded. If, therefore, when the circumstances under which the testator made his will are known, the words of the will do sufficiently express the intention ascribed to him, the strict limits of exposition cannot be transgressed, because the court, in aid of the construction of the will, refers to those extrinsic collateral circumstances to which it is certain the language of the will refers. It may be true, that without such evidence the precise meaning of the

words could not be determined; but it is still the will which expresses and ascertains the intention of the testator." By another general rule, if the words of a will, thus taken in reference to the circumstances under which they were used, will give a vested estate to persons who sufficiently answer the description, the court will not, by giving them a greater latitude, and taking into account other circumstances and contingencies, make that estate contingent, which is vested by the words of the will, the intention in that respect being in dubio.

Under these rules of law the intent of this testator may be discovered and effectuated. Had an uneven number of descendants of *Brown Willis*, or only one such descendant, been living at the date of his will, it would have been more difficult to solve the expression of "younger and elder *branches* of *Brown Willis's family*." But there were in fact four distinct branches, who, as well at the time of making the will, as of the testator's death, answered the description of *Brown Willis*'s family; two, *viz.* the daughters and their issue, answering the description of the younger, and the other two, the grandsons of the elder *branches*. No case ascertains the legal meaning of the word "branches;" but that of the word "family," in a devise to the *family* of the testator himself, is held to be a devise to the heir at law, the head of the family, *Wright* v. *Atkins* (*a*). *Barnes* v. *Patch* (*b*) decided that a devise to the *families* of *A.* and *B.*, means a gift to the *children* of *A.* and *B.* taken *collectively*, exclusive of their parents. That being so, and regard being had to the general rule of construction lastly stated above, the expression *branches* will embrace certain of the children indivi-

(*a*) Reported 17 Ves. 255; and on appeal 19 Ves. 301; Cooper, 116; Turner, 143.

(*b*) 8 Ves. 604.

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dually. The testator may not have accurately known the relationship of the different children to *Brown Willis*, and may have considered the two sons to represent the two elder, and the two daughters the younger *branches*. That word is not like personal seniority or juniority, as "members" or "individuals" would. In many cases an elder daughter has been held a younger "child."

If it is asked, what would have been the fate of the devise had any of the four died, living the testator, it is answered, that though a will speaks from the time of the death, the circumstances surrounding the testator, at the time of *making his will*, must be taken to be present to his mind, particularly as no alteration of them occurred in his lifetime, and they remained the same at his death as at the date of his will. Could *George* the third, after ascending the throne as heir at law of *George* the second, have taken as his grandson under a devise to *George* the second's younger children? As the testator preferred his daughter in his own family, there is no improbability of his preferring females in his ultimate dispositions. Unless both branches took in succession vested estates tail with cross remainders (*a*), no effect would be given to the devise over, or to the well known rules of law, that an interest capable of taking effect as a vested, shall not operate as a contingent remainder, and that a contingent remainder shall be preferred to an executory devise (*b*). As without younger there could not be elder branches, the testator could not intend the objects of the second devise to take in default of objects of the first.

Sir *William Follett* for the defendant. This devise gives an estate in fee to the younger branches, with a

(*a*) See Dyer, 330; Roll. Abr. 335.

(*b*) *Ives* v. *Legge*, 3 T. R. 489 n.

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substitution of the elder for the younger branches, to arise or not upon the contingency, whether at the determination or spending of the estates tail, there be or be not any younger branches in existence. The remainder was not vested, but contingent; and the contingency must be determined at the time when the particular estate ended. The whole argument for the lessors of the plaintiff is founded on the interest of the younger branches being a vested remainder expectant on the determination of an estate tail. [*Parke* B. Why is it essential to the claimants' case, that there should be an estate tail in the younger branches? The rest of the will may be void.] The whole clause must be taken together, and sense made of the whole by those who set it up. However, the devise is void for uncertainty. The court must put a rational construction on the will if it can be found, but cannot speculate on the testator's meaning. The rule is thus stated in *Jarman's* edition of *Powell on Devises*(*a*); "Whenever there is an irreconcilable uncertainty in the disposition made by a testator of his real property, the title of the heir at law shall be preferred to all others, because where a court cannot find words in a will which either expressly or by necessary implication, denote the testator's intention, beyond the possibility of a doubt, the rules of law directing descents which are certain, must prevail, and cannot be superseded by an uncertain devise." The heir is primâ facie entitled, and the estate cannot be taken out of him till he is displaced, and by the terms of his ancestor's will, beyond the possibility of a doubt in the minds of the court. But if a will is so uncertain that the court cannot see what persons or classes are intended to take under it, the heir at law

(*a*) Vol. 1. 348, collecting the cases, to which add *Davis* dem. *Selby* ten. 2 Scott, 82.

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cannot be ousted. No doubt the court must consider the situation of *Brown Willis's* family at the time of making this will; but it is erroneously assumed, that as it remained the same at the testator's death, it is therefore unnecessary to consider what would have been the interpretation of the will if any alteration of circumstances had taken place in the interval. But so to consider is very material to the due examination of this question. Suppose one of the daughters had died in the testator's lifetime without issue, who would have taken her share? [*Parke* B. The heir at law. So if she died leaving a daughter; for the devise would be void, as it speaks from the death of the testator. Lord *Abinger* C. B. We cannot tell that he might not have altered his will had circumstances changed. The true rule seems to be, that a will speaks from the time of the testator's death; and that ambiguities in it may be explained by reference to circumstances existing at the time it was made. *Parke* B. A will is supposed to speak from the time of the death, where classes of persons are provided for by it.] The testator cannot be taken to have been ignorant of the family of *Brown Willis*. Then how could he mean to designate particular individuals, and, knowing their names, to call them branches. What, can it be said that he meant to give specially to the two granddaughters and the two grandsons? The testator clearly meant that those should take, who were the younger branches of *Brown Willis*'s family at the period when the previous estates tail should fall in; and that if no younger branches then existed, the elder should take. The estate given is contingent on the determination of the estates tail, giving the elder branches a chance of taking, if at that time no younger branches should exist. Neither estate could vest if the substitution of one for the other

depends on a contingency. The testator would have named the children, and not used the word 'branches,' had he not contemplated a future period.

Next, who are the younger and who the elder branches of the *family* of *B. Willis?* A devise to "my sister *C.*'s family, to go in heirship for ever," passed the estate to *C.*'s eldest son and heir in fee, *Doe* d. *Chattaway* v. *Smith* (*a*). A devise to the 'house,' or 'family,' or 'stock,' is to be understood of the heir principal of the house; see *Chapman*'s case (*b*) relied on by Lord *Hobart* in *Counden* v. *Clarke* (*c*), and by Sir *W. Grant* in *Wright* v. *Atkyns* (*d*). The context of the devise in *Barnes* v. *Patch*, plainly showed "families" to be there nomen collectivum. The claimants should point out some persons in certain whom the testator would designate as younger and elder branches. The testator probably contemplated, that at the end of a long period occupied in wearing out the estates tail, there might be many descendants issuing from the elder and younger branches of *B. Willis*'s family, who might then take as tenants in common. The defendant is descended from a younger branch of the family, viz. *B. Willis*'s second son. The testator might not wish the elder son of *B. Willis* to take his property, because he would inherit his father's estate; but what proves him to have meant *B. Willis*'s daughters? It is only the accident of an even number of sons and daughters which saved the claimant from the impossibility of classing an uneven number. The testator more probably meant particular lines of the family, not particular persons of it. Descendants of daughters cannot properly be designated "branches" of their grandfather's family, for they do not bear his name or arms, but represent the families into which the daughters married.

(*a*) 5 M. & Sel. 126.
(*b*) Dyer, 333.
(*c*) Hobart, 33.
(*d*) 17 Vesey, 261.

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If it be doubtful whether the testator referred to the descendants of daughters or of sons, the estate ought not to be taken from the heir at law. Instances of substitution of one estate in fee for another, will be found in *Goodright* v. *Dunham* (a), *Kenn* v. *Dixon* (b), *Doe* v. *Perryn* (c), *Doe* d. *Davy* v. *Brunsall* (d), and see *Preston on Estates*, 488. Nothing is said as to the share of any daughter but *Mary Hervey*, through whom the lessors of the plaintiff claim. [Lord *Abinger* C. B. They say there were cross remainders by implication.] Whether or not that can be so implied, the court must be satisfied that the estate was intended to go to *Mary Hervey* and her descendants.

Hodgson in reply. If the court is compelled to hold this to be a contingent remainder, there is no such uncertainty as will avoid the will; for the division of branches is still sufficiently certain, though the persons designated by those words are not so. [*Parke* B. Suppose that the Court should think that the testator had no particular individuals of the family in view, who would answer the description of "younger branches" under that contingent remainder.] No such persons can be pointed out, but that uncertainty is a reason why the court will hold that he had in his mind some particular individuals. If the estate devised was an estate tail with cross remainders, the lessors of the plaintiff have the whole, and both parts of the devise are satisfied; but they may recover a moiety as the descendants of *Mary Hervey*, if the younger branches took an estate in fee. The substitution contended for could not take place, because there must be both younger and elder branches to satisfy the devise. It is

(a) Doug. 264.
(b) 1 B. & P. 254.
(c) 3 T. R. 484.
(d) 6 T. R. 30.

thrown out, that the terms "branches of the family," might exclude the "children" of *B. Willis* taken collectively. [Lord *Abinger* C. B. The testator clearly contemplated that the estate, whenever it did vest, would vest in more than one person.] This will is unique in requiring not only more than one person, but also more than one, both in the elder and younger branches of the family, in whom to vest the estate. The devise in *Doe* v. *Smith*, "to go in heirship for ever," is quite contrary to a devise to the branches of a family; which implies more takers than one. Would a devise to *all* the branches of *B. Willis*'s family be void for uncertainty? It might mean to designate the children and grandchildren jointly. Suppose a devise to the *Yorkshire* branches and then to the *Devonshire* branches of a family, and that there were two branches in each of those counties, would not they take in succession? The branches become such as soon as they leave the parent stock, but cannot exclude the children who individually compose them. It should not be lightly assumed that the testator intended to provide for persons who might not be in definable existence for two centuries. In *Doe* d. *Long* v. *Prigg* (*a*), *Bayley* J. said, "The law inclines to such a construction as will tend to vest a remainder unless a contrary intention appears, because contingent remainders are in the power of the particular tenant and may be destroyed; and it is more likely the testator should have intended that the limitations he made should be secure, than that they should be liable to be defeated." But in this case there are no words of survivorship at all. Mr. Justice *Bayley*'s doctrine much resembles that of Lord *Hardwicke* in *Ives* v. *Legge* (*b*), where, on a devise to *M. L.* for life, remainder to the children of her body and her heirs,

(*a*) 8 B. & Cr. 236. (*b*) Stated in a note to 3 T. R. 488.

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and in default thereof to *W. L.* in fee, it was held, that *W. L.* took a vested remainder. It was then argued, that the will operated to give the estate to the descendants of sons, because the descendants of daughters could not be considered branches of his family, daughters not having preserved the testator's name and arms. That observation comes with ill grace from the defendant, who, though descended from *B. Willis's* son, no longer bears his name and arms. Though the testator knew the number, sexes, and persons of the devisees, and that they constituted four branches at the time he made his will, he might not know their precise relationship to *B. Willis*, whether his children or grandchildren, and therefore designated them as "branches." That would explain the whole clause. Nor can it be objected to this construction that it makes the will rest on circumstances merely fortuitous, for every will does so rest. And a devise to *A.*'s son named *John*, which would be void for uncertainty if there was no son of that name, is equally fortuitous. *Doe* v. *Prigg* and *Cholmondely* v. *Clinton* (*a*), show that when a will can be so construed as to give a vested estate to particular persons, they shall take. It is contended, that the words of this devise created an estate tail in the two daughters, with cross remainders between them by implication; *Atherton* v. *Pye* (*b*), *Watson* v. *Foxon* (*c*), *Green* v. *Stephens* (*d*). But if the devise to the younger branches is a devise in fee, the lessors of the plaintiff, as heirs at law of *Mary Hervey*, are entitled to a moiety. The estate could not go over till failure of issue of both the daughters.

Cur. adv. vult.

In *Michaelmas* term 1835, judgment was delivered by

(*a*) 2 Meriv. 171, 340; 2 B. & Ald. 625; 2 Jac. & W. 81.
(*b*) 4 T. R. 713. (*c*) 2 East, 36. (*d*) 17 Ves. 64.

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Lord ABINGER C. B. who, after stating the material facts of the case, proceeded thus:—The question is, whether the lessors of the plaintiff are entitled to any, and if any, what portion of the premises devised by the will of *G. Browne.* Upon the best consideration which we can give to this question, we are of opinion that the lessors of the plaintiff take no portion of these estates. It was admitted in argument on both sides, that there is no case precisely in point, nor any in which a legal construction has been given to the words "branches" of a family. In fact, for the purposes of construing an obscure will, antecedent cases which are not directly in point, can be of no other use than that of establishing or illustrating rules of construction. These rules being once admitted, their application to the case in question, and their effect upon it, when applied, must still be open to discussion. It was said by the counsel for the lessors of the plaintiff, that the mere difficulty of arriving at a true construction at once, is not a sufficient reason for not attempting, if possible, to find a meaning for the testator. It must be admitted that the court is bound to apply itself with all diligence and attention to find the meaning of the testator, if it can possibly be found, however difficult and obscure; but if, after every effort to find that meaning, it becomes impossible to solve the difficulty, and dispel the obscurity, if no judicial certainty can be obtained of his real meaning, then the court is not bound to supply a meaning by conjecture, or to adopt an arbitrary meaning for the purpose of giving some effect to unmeaning or ambiguous clauses. It was also laid down by the plaintiff's counsel, that in construing a will, the testator must be presumed to speak with reference to existing circumstances; and further, that wherever the words of the will can bear such an interpretation, the court should so expound them as to give a vested estate. It

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may be doubted, whether on a special verdict (and this case is to be turned into a special verdict) the testator can be presumed, without an express finding of the jury, to have known the circumstances and situation of any family other than his own. Assuming however, for the sake of argument, that he did not exactly know the state of *Brown Willis's* family, when he made his will, that is to say, that two daughters were living, one of whom had four children alive, and the other none, and that this last was past child-bearing, being, as appears by the dates, of the age of sixty, and two grandsons, one the son of *B. Willis's* eldest son, and the other the son of his third son, the question arises what the testator meant by "the elder and younger branches of the family?" That he meant more than one person, is clear by his devising to the branches as tenants in common, and by using the words "elder branches" afterwards, in opposition to "younger branches." It is contended, first, that he meant the two sisters. The first objection to this, is the application of the words "branches of the family" to daughters who were married into other families, and whose descendants do not in common acceptation rank among the branches of the parent trunk from whom they had in a manner sprung; more especially, when there are male descendants of the male line living, who can properly bear the name, and represent the branches of the original family. The next objection is, that if he had known and meant to make these two sisters tenants in remainder on failure of issue of his son, it was so obvious to mention them by name, that one cannot on any reasonable ground account for the admission. It was next contended, that if he did not mean the two sisters exclusively, he must be taken to have meant them and the daughters of the elder of them then living. Now here the objection again occurs, why he should not have

named the individuals, if he meant certain individuals then living, and known to him. Moreover, when once it is supposed that he did not mean to treat the two living sisters as the only branches, but considered their descendants as branches also, then his not naming the living branches, which he might easily have done if he meant to confine it to them, lets in the more natural supposition that he meant to limit the remainder in fee to all who should be the younger branches at the time of the failure of the issue of his son. And if he meant to designate by the word "branches" not the children only, but the descendants of the children of *Brown Willis*, the word would comprehend the male descendants of the third son, who might very properly be called the younger branches of the family of *B. Willis*, in opposition to the descendants of the elder son, who would be the elder branches. Here then, on the supposition that he knew the state of the family, we have open to us the following conjectures; first, he might have meant to limit the remainder to the two sisters *Mary Hervey* and *Alice Eyre*; secondly, he might have meant to include the daughters of *Mary Hervey* then living with their mother and aunt; thirdly, he might have meant to limit the remainder to such persons as should be living at the time of the failure of the issue of his own son, and should be then considered the younger branches of *B. Willis*'s family; and lastly, which is not the least probable conjecture, he might have intended to limit the remainder in fee to such of the male descendants of *B. Willis* by his third son as should be then living. Upon one or the other of the two first suppositions only would the lessors of the plaintiff take any vested interest. But independently of the reasons afforded against the probability of these conjectures, we do not see why the court should prefer either of them to the other two. The rule that words should

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be so expounded as to give, if they can reasonably bear the construction, a vested, instead of a contingent estate, is not a rule to assist in finding out who the testator intended for the object of his bounty. It does no more than suggest the most desirable method of carrying that intent into effect, when those objects are discovered, assuming that a light sufficiently certain can be thrown on the individuals or classes whom the testator has designated; for that rule applies thus:—that the person shall take a vested, rather than a contingent interest, if the words of the will are not really and absolutely inconsistent with such an interpretation. If we cannot be satisfied that the testator meant either the daughters of *B. Willis*, or the existing descendants of those daughters, or such of those descendants as might thereafter exist and be alive on failure of issue of the son, this rule does not bind us to select the living among those parties, merely that the remainder might be vested instead of contingent. Upon the whole then, the meaning of the testator is open to several different conjectures, none of which appear to us to be of sufficient force to justify us in adopting any of them. We are of opinion that the limitation in the will of *G. Browne*, under which the lessors of the plaintiff claim, is void for uncertainty, and consequently the remainder in fee, after the extinction of the estate tail in the son of the testator, descended to that son as his heir at law. If the court considered itself under the necessity of choosing between the several conjectures, we should be more inclined to adopt the last as most probable; but in that case also the judgment would equally be for the defendant.

Judgment for the defendant.

WORTHINGTON *against* PRICE.

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An attorney must swear positively to his belief of a defence on the merits, and not that he is instructed and advised, as a party may.

An affidavit sworn in order to resist an application to a judge at chambers may be used on showing cause before the court, against the same application, if it has been referred by the judge to the court.

AN application had been made to a judge at chambers, to set aside a regular judgment signed for want of a plea, on payment of costs and producing an affidavit of merits. The judge desired the application to be made to the court. The affidavit of merits was made by the defendant and his attorney. The defendant swore that "he was advised and believed;" the attorney, "that he was instructed, advised, and believed" that the defendant had a good defence to the action, or the merits thereof. The court ordered the affidavit to be resworn by the attorney in the usual form, which was done and a rule was granted. Cause was shown on an office copy of an affidavit sworn in court, and which had been used at chambers in opposing the same application there. The court, after doubting if it could be used, and referring to *Quelly* v. *Boucher* (*a*), suffered it to be used, as the judge at chambers had expressly directed the application to be made to the court. *Alderson* B. added, that perjury might be assigned on it.

The rule was afterwards made absolute on the merits (*b*).

(*a*) 1 Scott, 283; 2 Dowl. P. C. 107, *S. C.* There the application at chambers, though in the same case, was of a different nature.

(*b*) See *Pickford* v. *Ewington*, afterwards decided, Tyr. & Gr. 29.

The ATTORNEY-GENERAL *against* SCHIERS and Another.

A foreign vessel not being square rigged, and coming within a league of the shore of any part of the united kingdom, having had prohibited goods on board in the same voyage, though having unshipped them before coming within that distance, is liable to forfeiture on an information in rem under 3 & 4 *W.* 4. c. 53. s. 2. (Smuggling Act.)

THIS information was brought on 3 & 4 *W.* 4. c. 53. s. 2., for the forfeiture of a vessel called the *Bien*

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Aimé, of *Cherbourg*, seized by the officers of customs; and charged for that being a foreign vessel, not square rigged, she was, on the 6th *July* 1834, found on the high seas within one league of the coast of the united kingdom, that is to say, within one league of the coast of *Dorsetshire*, to wit, at *Ratcliff*, the said vessel then and there having had on board certain parcels of foreign spirits in casks of prohibited size, &c. In another count, the ship was stated to have been *discovered* to have been on the high seas, within one league, &c. having had on board foreign spirits, &c. The 3 & 4 *W.* 4. c. 53. s. 2. enacts, that if any foreign vessel or boat shall be found or discovered to have been within one league of the coast of the united kingdom, any such vessel or boat *so found or discovered, having on board*, or in any manner attached thereto, or *having had on board*, or in any manner attached thereto, or conveying, or having conveyed in any manner, any spirits, not being in a cask or package containing 40 gallons at least, &c., then and in such case the said spirits, &c., and the casks or packages containing the same, &c., and also the vessel or boat, shall be forfeited.

At the trial before Lord *Abinger* C. B. at the revenue sittings at *Westminster* after last term, it appeared that some of the *Portland* coast-guard being in boats about half a mile from shore, on the night of 6th *July* 1834, boarded a boat there, called *La Marie*, which was manned by three *French* and two *English* sailors, without compass or provisions, and with 71 casks of foreign spirits in half-ankers, slung ready for sinking at sea, or transporting them inland. They forthwith moved her off towards shore, but before arriving there saw the *Bien Aimé* becalmed about half a mile from shore, and three-quarters of a mile from the spot where they were. An officer went off to her, boarded an-

searched her, and found marks of casks in the hold, a strong smell of spirits, and some clothes of five different men. On these appearances, he concluded that the foreign spirits in *La Marie* had been lately taken from *La Bien Aimé*, and seized that vessel. For the defendant, it was argued that there was no proof that the *Bien Aimé* had had the prohibited spirits on board within a league of the coast. But the Lord Chief Baron delivered his opinion to the jury, that if they believed that the spirits found on board *La Marie* had been unshipped from the *Bien Aimé*, at more than a league off the coast, she was liable to forfeiture, having since come within that distance. Verdict for the crown.

John Jervis moved for a new trial. The words "having had on board" have relation to the words "found or discovered," *i. e.* to have been within one league of the coast. These words were used to provide against floating or sinking prohibited goods within a league from shore. If a vessel, after unshipping such goods at sea out of the prescribed distance, should be liable to seizure if afterwards found in a legal state within it, a ship which had prohibited goods on board in the *East Indies*, and comes home without them, would be equally liable. The same would be the case if a ship left a *French* port with such articles on board, but sent them back and came herself within the league. [Lord *Abinger* C. B. To answer that extreme case by another; suppose a vessel to unship prohibited goods a few yards beyond a league from shore, is she protected from seizure when she comes within that distance? The object of the act was to make the vessel seizable if found within the league, after having had contraband goods on board during that voyage.

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It was a substitution for the old acts against hovering, and a legislative declaration that if a vessel so circumstanced is found within a league from shore, it is evidence of a guilty intent to land the goods in *England.* If this ship, keeping off out of that distance, had put contraband goods in the boat, and sent her ashore with them on board, and then stood in to take the boat's crew off, I consider her seizable; and so answered a question from the jury.] The words "then and there" in the information must be referred to the prior words "within a league," &c., so as to import that the *Bien Aimé* had the goods on board within that distance.

The COURT overruled the latter point; but said they would look into the act before granting or refusing the rule on the former. In the course of the term

Lord ABINGER C.B. said,—This was a case in which we delayed granting a rule till we had looked more fully into the statutes. We have now done so, and think there is no foundation for the distinction attempted to be established for the defendant. The provision which renders a vessel liable to forfeiture, having had contraband goods on board before entering the prohibited limits, is clearly applicable to the particular voyage in which she both discharges the goods and afterwards enters the prohibited limits, and to that voyage only. It cannot be supposed that the legislature contemplated any thing so absurd as to provide against the extreme case put for the defendant; viz. the case of a vessel having had prohibited goods on board somewhere or other twenty years before, and then coming twenty years after within a league of the coast. The statute seems indeed to be directed

against the very case of a vessel having had goods on board in prohibited packages, discharging them before she enters the specified limits, and then, on that identical voyage, following to assist in the landing, to protect her boat, or receive back the crew. No rule therefore can be granted.

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Rule refused.

WHITE *against* JOHNSON.

On a rule for setting aside a distringas, the only question is, whether there is not enough on the plaintiff's affidavits to justify the granting the distringas; unless *comm. semb.* the defendant has sustained substantial injury under special circumstances.

A RULE had been obtained for setting aside a distringas, on an affidavit sworn by the defendant, that on 18th *November* last he left this country for *Paris*, and did not return to the country till 4th *April* last, and that he went over to *Paris* on important business, and was engaged therein during that period on the said business, and did not go abroad to avoid his creditors, and was not aware, directly or indirectly, that the above-named plaintiff had taken any proceedings against him, till on 28th *April* last he received a notice of a declaration having been filed as of that day.

The defendant's attorney also swore that the defendant left the country for *Paris* with his family in *November* on important business, and not to avoid his creditors, and that during his absence the deponent, by his desire, acquainted every one who called at the defendant's residence of his absence, and that he would return. He also swore that the writ of summons was issued on 3d *March* 1835, and that a writ of distringas issued on 23d *March* by order of a judge. On 26th *March* the plaintiff levied on the goods and chattels of the defendant for 40*s.*,

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and received the amount of the levy, delivering a copy of the distringas to the defendant's servant.

Knowles was about to show cause (*a*), but the court called on

Humfrey to support the rule. He urged that the defendant must be shown to have been seen in *England* at least, if not at home or in the neighbourhood, during the time the calls are made to serve him with process: *Price* v. *Bower* (*b*). The plaintiff has not sworn that the defendant kept out of *England* to prevent service of process, and if he had, the court would have required evidence to satisfy them that his stay abroad was with that intention. [Lord *Abinger* C. B. The defendant might have changed his mind when he got half way to *Paris* and have returned here.] No such fact is suggested on the other side.

Per Curiam (*c*).—The only question is, whether there is not enough on the face of the plaintiff's affidavit to justify a judge in granting a distringas: for if the court was to enter into the facts of each case in

(*a*) His affidavits were similar to those used before the judge who granted the distringas, and disclosed that a creditor of the defendant called several times in *November* and *December* last at the defendant's house to see the defendant and get his debt settled, and that the servant whom he saw never said he was in *Paris*, but that he was not at home. That on one occasion the deponent, who was at the door half closed, saw the defendant coming down stairs, and the servant declared she was told to say the defendant was out. That the deponent afterwards called in *January*, and was told the defendant had gone out a few minutes before, but would be home to dinner at five. The plaintiff's attorney had on four days in *March* called at the defendant's residence, making appointments to call again, and being always told the defendant was from home, he left a copy of the writ of summons, and showed the original to the servant.

(*b*) 2 Dowl. P. C. 1; *Anon.* 1 Tyr. 499; 8 Taunt. 171.

(*c*) Lord *Abinger* C. B. *Parke*, *Bolland*, and *Gurney* Bs.

which the defendant has sustained no substantial injury, an infinity of motions would be produced. Consistently with the defendant's affidavit, he may have left this country for *Paris*, and after staying abroad a few days returned here till a few days before the 4th of *April*, when he may have gone to *Calais* and returned on that day.

Rule discharged with costs.

MAC AULIFFE *against* BICKNELL and Others.

The captain of a whaler was a joint owner of the vessel. A seaman about to sail on a whaling voyage signed articles of agreement, not to sue any of the owners for wages except one, who was the captain, and the only owner party to the articles. The other owners sold the cargo when brought home, received the proceeds, and the managing owner settled the wages with the seaman, but it was held the seaman could not sue any owner not named in the articles.

On settling with the seaman for his wages, the owner claimed to make deductions for insurance, and interest on advances made to him on account of wages. The owner's clerk proved these charges to be usual. The seaman remonstrated against them, but eventually accepted the balance offered him minus the deductions, and signed a receipt as for his whole wages: Held, that by having so done he was estopped from recovering from the owners the sums thus deducted.

A seaman stipulated, that instead of receiving monthly wages, he should have a 90th share of the net proceeds of the cargo to be obtained on a whaling voyage. The owner charged him with insurance on his share, though the freight had never been insured; the seaman remonstrated, but finally took the balance minus the deductions, and signed a receipt as for his whole wages: Held, that he was estopped from recovering back the item for insurance as money had and received to his use, and that the owner need not plead a set-off in order to insist on that deduction; for the seaman was a joint adventurer.

ASSUMPSIT for wages as a cooper and mariner, with counts for work and labour generally, money had and received, and on an account stated. Plea: general issue. The plaintiff's particulars of demand claimed 25*l.* 17*s.* made up by the following items: 15*l.* 10*s.* for balance of wages due to plaintiff as cooper and mariner on board the ship *Coquette*, during 1827, 1828, and 1829, and 10*l.* 7*s.* for a balance due to him for money received by the defendants to his use, in respect of his 90th lay or share of the net proceeds of the cargo of oil obtained by the *Coquette* in the *South*

these presents that the agreement hereby entered into and made, shall be considered as binding and affecting the parties hereto only, and not the said ship or the said owners, or any or either of them, in any respect whatsoever." A claim followed for referring differences to arbitration. The seamen signed in a tabular form as under:—

No.	Names.	Stations.	Shares.	Advance.	Monthly Money.	Seals.
4.	*D. M'Auliffe.*	Cooper.	5*l.* 5*s.* per month.	10*l.* 10*s.*	2*l.* 10*s.*	(L. S.)

The ship sailed immediately after the signing the articles, and brought back a valuable cargo to *London* in *October* 1829. The defendant served all the voyage pursuant to his articles. *Cooke*, a clerk to the managing owner, settled the wages, crediting the plaintiff with 25*l.*, after debiting him with the 10*l.* 10*s.* advanced to him, as well as the monthly advances on the voyage, and also 15*l.* 10*s.* for *insurance of his share and interest* on those advances at 5 per cent. from the time of their payment to the end of the voyage. The plaintiff complained of these deductions as not having been charged by his former owner, but took the balance and gave a receipt for his whole wages. He afterwards made another voyage in the same ship on similar terms, except that instead of monthly wages, he was to have the 90th lay or share of the net proceeds of the cargo to be obtained. The cargo proved unusually valuable, and the plaintiff's 90th share amounted to 141*l.* 14*s.* 8*d.*, which was reduced by advances and similar deductions to a balance of 37*l.* 16*s.* 7*d.* On this occasion *Cooke* charged him 4*l.* 2*s.* for insurance of his share, and 6*l.* 5*s.* for interest on the advances. Plaintiff again objected, but being assured by *Cooke*, that by the univer-

[illegible] the owners were entitled to [illegible] balance offered him and signed a [illegible] wages. In fact the freight had [illegible] though the ship and outfit were. [illegible] action was brought to recover the sums so [illegible] insurance and interest. *Cooke* was called [illegible] and being cross-examined for the de[illegible] its masters, said that the charges made were [illegible] in the trade, and that the accounts were [illegible] made out so. The defence was first, that by the [illegible] stipulation of the articles, the plaintiff could not [illegible] owner but *Thornton*: and secondly, that he [illegible] recover after accepting the sums made out [illegible] balances, and giving receipts for them as [illegible] the plaintiff it was answered, that in law the crew were not bound by such covenants as had been inserted, and that the plaintiff was at least entitled to recover the charge for insurance, which had never taken place, as for money had and received to his use. In answer to questions from the court, the jury found that the plaintiff signed the articles, and that the settlements were made bonâ fide. The learned baron then directed a nonsuit, giving the plaintiff leave to move to enter a verdict for 4*l.* 2*s.*, the charge for insurance.

Addison moved accordingly. First, as to the first voyage, these contracts are of such a nature as could not bind the plaintiff. Seamen are an ignorant and careless race of men, practically defenceless against the practices of the shrewd persons whose vessels they navigate. They are therefore under the peculiar protection of the law, and the court will therefore strictly watch an agreement like this, the terms of which are exclusively contrived by the ship owners, and to which the seamen gave a hurried assent under a kind of duress, and com-

ilsion to proceed to sea immediately. But at all ents, if the plaintiff was bound by these articles, the ruse against suing the owners is inconsistent with elf, for at that rate *Thornton* himself could not be sued. ord *Abinger* C. B. The clause means, that owners *as ch* are not to be sued.] But as the defendants had t the whole fund from which the wages were to come, z. the cargo and freight, the managing owner *Deacon* ok on him to pay the seamen their shares, *Thorn-* n having no share in so doing. By that act of *Dea-* n the defendants waived the protection of that clause. *White* v. *Mattison* (*a*) Lord *Ellenborough* held, that clause in a ship's articles, by which a crew were not sue for wages within twenty days after arrival in rt, was no answer to an action within that time, rought for a sum which the owners admitted to be ne within that period. [Lord *Abinger* C. B. That se is only at nisi prius. Its effect is, that if a party nders a sum before he is bound to pay it, that waives e extension of time, and an action may be brought efore its expiration. What law fetters a man from tering into a contract that only one person shall be ound by it? The waiver is nothing; no doubt the ages are to come from the owners, but only the mas- r was to be liable at law. If he was a bankrupt the amen's remedy was in equity. So if they were im- osed on, these articles would be void, and they might ecover for their services. Nor can it be said to be a isdirection to tell the jury, that the clause in these rticles bound the plaintiff.] Stat. 59 *G.* 3. c. 58. (*b*) nacted by sect. 3. that no seaman, by entering into ny contract or stipulation, having the effect of depriv- ig him of the remedies given him by that act for re-

(*a*) 2 Stark. C. N. P. 325.

(*b*) This act is repealed by 5 & 6 *W.* 4. c. 19. s. 1., and replaced by s. 4. 15. and 16. of that act.

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covering his wages before magistrates, shall be hindered from using any other means for their recovery against any ship, or the master or owners thereof, which he had before that act passed, or by law might afterwards make use of. [*Alderson* B. That merely saves to seamen their rights to enforce particular contracts in a particular way,—a stipulation not to sue for wages before a magistrate would be within that act. But this is another contract, and the previous remedy remains. No act declares that when one man binds himself another shall be liable.] Articles resembling these were set up in equity as a defence to a bill filed by a seaman against his owner, for an account of sales of cargo, and Sir *John Leach* M. R. decreed the account, notwithstanding *Gosling* v. *Smith* (*a*). [Lord *Abinger* C. B. Perhaps in equity the seaman might pursue the fund in the owner's hands.] The seaman could not insure his wages, then how can insurance be lawfully charged on advances in respect of them?

As to the second voyage, the plaintiff was entitled to recover the 4*l.* 2*s.* deducted by the defendants for insurance on freight which had never been made. The plaintiff stipulated for a 90th share, which was a partnership claim dehors the articles. He worked in obtaining a valuable cargo, of which the owners received the proceeds, and they not having insured the freight, he was entitled to receive his share free of charge for insurance. Nor was any stipulation for interest made when he received advances. Besides, the defendants should have pleaded the deductions by way of set-off. [*Alderson* B. But that cannot be a defence after you allowed these deductions and then received the balance.]

Lord ABINGER C. B.—There is no colour for our

(*a*) Not reported, but see Tamlyn's Rep. 45, *Spittal* v. *Smith*, and 55, *Cockle* v. *Whiting*.

granting this rule. The action is improperly brought against several parties on a contract which binds the plaintiff to look to one person only. That is in itself a sufficient answer to the objections, and the plaintiff is prevented from suing any person except the captain, *Thornton*, even in an action for money had and received. Nor is there ground for arguing that the defendants should have pleaded a set-off; for the charge for insurance is not irregular, this action, as far as relates to the second voyage, not being by a seaman for wages, but by one of several joint adventurers against the rest. Then the owners, as managers of the joint concern, may charge insurance in order to find the "net proceeds," and each party is bound to pay his proportion of it if it be a usual charge, which the jury found it to be. There was no evidence of fraud in the inception of the contract, and the jury found the settlement to have been fair between the parties.

BOLLAND B.—I am of the same opinion. The stipulation was for a 90th share of the joint profits. To ascertain these last, the usual charges are to be deducted from the gross proceeds, and the profits estimated clear of those deductions. The plaintiff was also liable to pay interest on advances made during the voyage.

ALDERSON B.—The first objection is fatal, and were that otherwise the second is equally so.

GURNEY B. concurred.

Rule refused.

See now an excellent statute, 5 & 6 *W.* 4. c. 19. passed to amend and consolidate the laws relating to the merchant seamen of the united kingdom, and to better the condition of that most deserving class of men. Sections 2. 3. and 4. particularly apply to agreements previous to sailing on a voyage. But what enactments can protect a seaman's improvidence against the designing of all classes?

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PIERCE *against* EVANS.

A claim of 50*l.* was made on an account stated. The evidence was, that the defendant had admitted that item to be due to the plaintiff, on an account stated between them of other matters not now in question, and had paid interest on it for some years, and had also promised to pay the principal. The defendant's case was, that this item was originally brought into the account between him and the plaintiff in consequence of a written undertaking by him (which he had since taken from the plaintiff and destroyed in an indefensible manner), by which the defendant undertook "to remit the plaintiff 50*l.*, which sum I (the defendant) hold of *H. Pugh*, and by him authorized to pay you" (the plaintiff). *Pugh* was called, and swore that he never gave the defendant any such authority to pay 50*l.* for him, *Pugh*, to the plaintiff; and that he had since settled all the debts he owed the plaintiff. Held, that *Pugh*'s evidence was admissible for the defendant, and, if believed, entitled him to a nonsuit; and the court having been substituted for the jury, by agreement between the parties, made a rule absolute for entering a nonsuit.

ASSUMPSIT for use and occupation, with counts for money had and received, interest, and on an account stated. The plaintiff's particulars of demand claimed 17*l.* 10*s.* for rent of a skin-house and premises; 50*l.* for money had and received by the defendant from one *Pugh* for the use of the plaintiff, on 8th *April* 1831; and 3*l.* 7*s.* for interest on that sum from 1st *July* 1833. The rent was paid into court. At the trial before *Bolland* B. at the last *Carnarvonshire* assizes, the plaintiff sought to recover the 50*l.* and interest on the account stated. He proved, that long before *July* 1834 the defendant had paid interest on 50*l.* due from him to the plaintiff on the balance of an account between them, and that on the 22d of that month he applied to the defendant for the 50*l.* with the interest then due; the defendant acknowledged the demand to be correct, and promised to settle it on a named day. On that day the plaintiff came to *Carnarvon*, and went with the defendant to his house, but shortly after came to the witness, saying that the defendant and his wife had torn the security which he the plaintiff had for the 50*l.* The day before this cause was tried, the plaintiff gave evidence of the contents of the security on an indictment against the defendant for stealing it. For the defendant, a written note of what the plaintiff stated on that occasion to have been the contents of the paper was produced; viz. "Mr. *William Pierce*, soon after I return home, I undertake to remit you 50*l.*, which sum I hold of *H.*

ı, my father-in-law, *and by him authorized to pay*

pril 8th, 1831. *William Evans.*"

h swore that he sold a house to defendant in *April* . for 400*l.*, which was then due, and that the wit- owed the plaintiff money at the same time. He e that he never authorized the defendant to remit ay the plaintiff 50*l.* or any other sum, and that no ement was made to that effect: he also swore that lefendant refused to become surety to the plaintiff the witness's debt, and that he, *Pugh*, had since ed all his accounts with the plaintiff. The defend- ı counsel contended that the plaintiff must be non- ed; first, because the mere transfer by the defendant ıe plaintiff of the debt due from the defendant to *h* passed no right over it to the plaintiff; for, first, *h* could not have sued the defendant for that debt r money had and received; *Wharton* v. *Walker* (*a*). l secondly, that the three parties, viz. *Pugh*, the ıtiff and defendant, had not concurred in agree- to the transfer, but, on the contrary, *Pugh* had r authorized it. The learned baron directed a lict for the plaintiff for 53*l.* 7*s.*, giving leave to move nter a nonsuit. A rule having been obtained for a suit or a new trial accordingly,

ir *William Follett* showed cause.—A new trial only ld be had if the document of which evidence was n affected the case, but it did not, and the judge right. For the plaintiff does not seek to recover the written agreement, but on the account stated veen him and the defendant; and if a party agrees ay, or admits that he owes, a certain sum, can it be defence to show that the debt originally accrued

(*a*) 4 B. & Cr. 163.

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in right of a debt due from the defendant to anothe person? *Williams* v. *Everett* (*a*) does not apply. Man reasons might operate as a sufficient consideration f the defendant's admitting the debt of 50*l.*, and ev for his promising to pay it. How can the defendant, 1835, set up as a defence *Pugh*'s evidence that h *Pugh*, had not given the defendant authority to p the 50*l.* to the plaintiff, after he the defendant had 1831 stated in writing to the plaintiff that he had su authority, on the faith of which statement the plaint had afterwards acted? *Shaw* v. *Picton* (*b*) is an auth rity that the defendant could not so turn round. [*A derson* B. The question there was, whether the grante of an annuity could be compelled to refund. T giving credit seems to have been there considered payment on account. Had the defendant here actual paid over the money, the cases might be parallel When *Pugh* settled with the plaintiff, he *Pugh* migl have been credited that 50*l.* by the plaintiff, as to h paid to the defendant. That is consistent even wit the evidence of *Pugh* himself; nor can the defendan contend that the representation he made in 1831 wa made by mistake.

J. Jervis and *Welsby* supported the rule. It make no difference that the plaintiff relied on the accoun stated; for as soon as it appeared that, for want o *Pugh*'s authority, no action could be maintained i respect of the original consideration, it mattered nothing whether the plaintiff attempted to recover on that count, or on the count for money had and received, both being founded on the same transaction. *Pugh* swore that he never agreed to the transfer by the defendant of the 50*l.* debt due from the defendant to him

(*a*) 14 East, 582. (*b*) 4 B. & Cr. 715.

i, to the plaintiff. In that case the plaintiff could ecover, but if *Pugh* had in fact authorized the ent of the 50*l.* by the defendant to the plaintiff, ction would not lie, for *Pugh* could not have sued efendant for the 50*l.* as for so much money had *eceived* by the defendant to the use of him, *Pugh*; *rton* v. *Walker* (*a*), *Cuxon* v. *Chadley* (*b*), *Fairlie mton* (*c*). The defendant was not estopped, by r of record or deed, from showing the real cha- r of this transaction, for he did not seek to avail lf of his own wrong against the plaintiff; for if never authorized the defendant to make the re- ntation in question, *Pugh* has either paid the iff or is still liable to him for it. The cases cited , that in order to transfer to *C.* a debt due from *B.*, so as to vest in *C.* a right to recover it against here must be the consent of all the parties to the itution of one creditor for another, so that in any the question whether such an agreement here d among the parties, will be a proper question on r trial.

LLAND B.—I am of opinion that in this case the for entering a nonsuit must be absolute. The question disputed at the trial was, whether the dant's evidence had so far overturned that of the tiff, as to show that in law the latter could not tain this action. I for some time addressed the in order to leave the whole question to them, but rangement between the parties, the question was lrawn from the jury, and brought before the court present state. Had that not been my impression uld have left the whole case to the jury on *Pugh*'s

(*a*) 4 B. & Cr. 163. (*b*) 3 B. & Cr. 591.
(*c*) 8 B. & Cr. 395.

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evidence, as that evidence shows that the plaintiff could not maintain the action.

ALDERSON B.—The agreement between the parties at the trial has put us in the place of the jury. It could only have proceeded on the supposition that the witness *Pugh* was credible, for otherwise they never could have consented to it. If that be so, the plaintiff's case is at an end; for, as to the 50*l.* (which is all that now remains in dispute), the defendant's admissions only amount to this, that in 1831 he promised in writing to pay that item, under a misunderstanding of his authority from *Pugh* to pay it. That is so explained, as well by the document itself, as by the evidence of *Pugh*, who denies that he gave the defendant such authority, and proves that he *Pugh* has since settled the debts due from him to the plaintiff. Then why are we not to infer that on that settlement, he, *Pugh*, handed over this 50*l.* to the plaintiff? Then if the plaintiff were to recover, he would be getting again from the defendant *Evans*, a debt from *Pugh*, which had been already discharged by *Pugh* himself. We are bound to take *Pugh*'s evidence as credible; a defence to the action is established; and the defendant is entitled to enter a nonsuit.

GURNEY B. concurred.

Rule absolute for a nonsuit (*a*).

(*a*) See cases collected *ante*, Vol. IV, 259, note (*f*).

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THORPE *against* COLE and Another.

By an agreement to refer matters in difference, it was recited that the plaintiff

ASSUMPSIT. The declaration stated, that whereas heretofore, to wit, on the 15th *April* 1834, by a certain agreement then made and entered into between and another had given notices of appeal against a poor-rate, and that the defendants, the churchwardens and overseers, intended to defend the same, but in consequence of the parties to the rate agreeing to leave the examination of it, and all matters in dispute between them, as stated in the notice, to arbitration, no appeal was entered against the rate, and that the parties in order to prevent further expense, and to settle and ascertain the subject of the said poor's-rate, and the quality or inequality thereof, so far as the charges therein made on the plaintiff, as compared with the rate made on the other persons mentioned in the notice of appeal, had agreed to leave the matters therein mentioned to arbitration. The operative part of the agreement witnessed that the defendants (as far as they lawfully could as such churchwardens) and the plaintiff mutually agreed to abide by the award of *W. A.*, *R. D.*, and *P. B.*, or any two of them, who were to award and determine of and concerning the said matters in difference, and of and concerning all the expenses of the said agreement, and of the said notices of appeal, and of the said churchwardens, &c. And in consequence of such notice of appeal, and of their preparation to resist such appeal and to support the rate and all matters relating thereto, the arbitrators awarded that the defendants should pay unto *T. E. T.*, attorney for the plaintiff, 16*l.* 12*s.*, his bill already delivered, and the amount of the costs of the said *T. E. T.* attending the arbitration, &c. And they further directed that the defendants should deduct from the accounts charged in all future rates the sum of 10*s.*, and return to the plaintiff the sum of 10*s.* for every rate granted and paid by him since the then scheme had come into operation.

The award further directed, that as a dispute was made with regard to the size of the lake occupied by the plaintiff, it should be ascertained by the parish and the rate altered accordingly, agreeable to the price per acre as set against the said lake, by the arbitrators, in a schedule to their award. In an action on the above award the plea set out the submission and award at length and concluded thus: "And the defendants in fact say, that the award is bad and void in law, and this they are ready to verify."—Held, on demurrer to the plea, that it was good in form and substance.

Held, *Parke* B. *dissentiente*, that the submission and award were bad, on the ground that the arbitrators had no authority to determine as to the validity of the rate, it not being by law a matter capable of reference to arbitration; and that the costs incurred being merely accessory to the decision of the principal question, the consideration for the submission wholly failed. Error having been brought, the Court of Exchequer Chamber affirmed this part of the judgment of the court below, giving no opinion on the other questions.

Held by Lord *Abinger* C. B., that the award was also bad for directing the churchwardens and overseers to return and refund to the plaintiff 10*s.* on each rate made since the new scheme had come into operation, as that direction was not binding on them, for they could not by law comply with it, and could not be compelled to do so.

Held by Lord *Abinger* C. B., that the direction that the quantity of the lake occupied by the plaintiff should be ascertained by the *parish* was too uncertain, leaving doubt as to who was to ascertain the size of the lake.

Held by *Parke* B. first, that notwithstanding the churchwardens and overseers could not be legally bound by the settlement of the rate made by the arbitrators, yet

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the defendants therein described as the churchwardens and overseers of the poor of the parish of *Holywell cum Needingworth*, in the county of *Huntingdon*, of the one part, and the plaintiff and *Edward Thorpe*, of the other part. After reciting that on or about the 28th *January* then last past, a rate was made and allowed for the relief of the poor of the above-named parish, and that the said plaintiff and *Edward Thorpe* were respectively rated for several messuages, cottages, lands, pastures, closes, and garden grounds there, in aid of the said rate; and that the said plaintiff and *Edward Thorpe*, conceiving themselves to be overrated for the said property, and much more in proportion than several other parishioners named in their respective notices of appeal thereinafter mentioned, for their messuages, lands, and hereditaments there; and conceiving the said rate in many other respects to be unjust, unfair and partial, did, on the 26th *March* then last, severally give a notice to the defendants, the above-named churchwardens and overseers, of their respective intentions to appeal at the next general quarter sessions of the peace for the county of *Huntingdon*, against the said rate or assessment, and alleging in their respective notices certain specified grievances and grounds of complaint, and that the

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that the reasonable construction of the contract of submission was, that the arbitrators should do what by law they could; viz. make a valuation as a guide to the parties for their future conduct; so that the award was not void on that ground. Secondly, that the ascertaining of the quantity of the lake was a mere ministerial act, which might be delegated to another, and that the award was not void on that ground. And thirdly, that it was not on the ground that the amount of the costs to be paid by the defendants, on account of the plaintiff's expenses of notices of appeal, as well as of the agreement or counterpart, were not ascertained by the award with sufficient certainty, for as the award was made *de premissis*, it ought to be intended that the sum of 16*l.* 12*s.* was for one of the matters submitted, viz. the costs of the notices, according to the rule that the words *de premissis* in an award have the effect of applying its general words to each particular thing submitted, and that the share of the costs payable by the plaintiff to his attorney might be ascertained by reference to the bill already delivered.

ndants, the said churchwardens and overseers, ving the said rate to be a fair and equal one, did id to defend the same, but in consequence of the parties thereto agreeing to leave the examination ie said rate, and all matters in dispute between ı, as stated in the said notices, to arbitration, as einafter mentioned, no appeal was entered with clerk of the peace for the said county against the rate as by law was required; and that the said es, in order to put an end to all further expense, o prevent litigation respecting such poor's-rate, and der to settle and ascertain the subject of the said 's-rate, and the quality or inequality thereof, so far e same related to the charges therein made on the plaintiff and the said *Edward Thorpe*, respectively, mpared with the rate made on the property occu- by *S. Cole*, *S. Thorpe*, *R. Daintree*, *J. Crosen*, the several other persons named in the said notices peal, had agreed and thereby did agree to leave ame matters in difference between the said parties to, as stated in the notices of appeal, and all things ng thereto, to the order, arbitrament, and final d of *W. Abbott*, *R. Daintree*, and *T. Boyer*, as inafter was mentioned: It was by the said agree- witnessed, that the said defendants, *as far as lawfully might or could*, as such churchwardens overseers, did thereby for themselves and their ssors, and they the said plaintiff and *E. Thorpe* hereby for themselves severally and respectively, for their several and respective heirs, executors, ıdministrators, mutually promise and agree to and each other, that they the defendants, the said hwardens and overseers, and the said plaintiff and *horpe*, and each and every one of them, should vould from time to time and at all times thereafter abide by, perform, fulfil, and keep the award,

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order, final end, and determination of the said *W. Abbott, R. Daintree*, and *T. Boyer*, or any two of them, elected and named as aforesaid by the said parties in difference, to award, order, and determine of and concerning the above matters in difference, and of and concerning all matters in difference, and of and concerning all and every the costs and expenses of the said agreement, and of the counterpart thereof, and of the said notices of appeal, and of the said churchwardens and overseers, in consequence of such notices of appeal, and of their preparations to resist such appeal and support the said rate, and of all and every matters relating thereto respectively, so that the said arbitrators, or any two of them, should make and publish their award, order, or determination of and concerning the premises, in writing under their hands, ready to be delivered to the said parties, or to either of them, requiring the same on or before the 5th *May* then next ensuing. And the said parties thereto further agreed, that the costs of the said arbitration and award to be made in pursuance thereof, should be in the discretion of the said arbitrators, or such two of them as might give in their award concerning the same, who should award by whom, to whom, and in what manner the same should be paid. And it was thereby further agreed by and between all the said parties to that agreement, that that agreement and submission to arbitration should be made a rule of his majesty's Court of King's Bench at *Westminster*, to the end that the said parties in difference should be finally concluded by the said arbitration by the said agreement intended, pursuant to the statute in such case made and provided. The declaration then alleged mutual promises for the performance of the agreement, and then averred that the said *W. Abbott, R. Daintree*, and *T. Boyer* did, on &c. take upon themselves the

burthen of the said award and arbitrament. After stating two enlargements of the time for making the award, it averred, that on 14th *May* 1834, they did make and publish their award in writing under their hands, of and concerning the premises and matters to them referred as aforesaid, ready to be delivered to the said parties, or either of them requiring the same, whereby they the said *W. Abbott*, *R. Daintree*, and *T. Boyer* did award, adjudge, and declare that the defendants should, on delivery of that award, well and truly pay or cause to be paid unto *T. E. Fisher*, attorney of the plaintiff, and *Edward Thorpe*, the sum of 16*l.* 12*s.* his bill already delivered, and the amount of the costs and charges of the said *T. E. Fisher* attending that arbitration, and of procuring the signatures of his said clients and the other parties to the said enlargement of time; and they did thereby further direct, that the defendant should deduct from the amount charged upon the plaintiff in all future rates, the sum of 10*s.*, and should return to him the plaintiff the sum of 10*s.* for every rate granted and paid by him the plaintiff since the then scheme had been in operation; of which said award the defendants afterwards, to wit, on &c. had notice, and the said award was then delivered to them. Yet the defendants, although often requested so to do, have not, nor hath either of them, as yet paid to the said *T. E. Fisher* the said sum of 16*l.* 12*s.* his said bill delivered, or any part thereof; and although the costs and charges of the said *T. E. Fisher* attending the said arbitration, and of procuring the signatures of his said clients and other parties to the said enlargement of time, amounted to a large sum, to wit, 4*l.* 18*s.* 6*d.* whereof the defendants afterwards and after the making and delivery of the said award, to wit, on &c. had notice, and were thereupon requested by the said *T. E. Fisher* to pay him the same, yet they did not nor would

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then or at any other time pay him the same, or any part thereof, but so to do they have and each of them hath hitherto wholly neglected and refused. And the plaintiff in fact further saith, that although before the making and entering into the said first-mentioned agreement, divers, to wit, one hundred rates had been granted and paid by plaintiff since the scheme existing at the time of the making the said award had been in operation, so that under and by virtue of the said award, the defendants became liable to return and pay to the plaintiff a large sum, to wit, 50*l.*, being the sum of 10*s.* for every rate so granted and paid as aforesaid, of which premises the defendants afterwards, to wit, on &c. had notice; yet the defendants have not, nor hath either of them, as yet returned or paid to the plaintiff the said sum of 50*l.* or any part thereof, but have and each of them hath hitherto wholly neglected and refused, and still doth neglect and refuse so to do.

The defendants pleaded, setting out the agreement of submission and the award at full length. The first was in the terms stated above. The award recited the agreement, and after awarding the sum of 16*l.* 12*s.* and the costs of the said *T. E. Fisher* attending the arbitration to be paid to him, directed that the defendant should pay to Messrs. *A.* and *L.* the sum of 20*l.* 4*s.* for their costs of attending the reference, and the sum of 57*l.* 19*s.* to them for the charges of the arbitrators. The defendants were then ordered to deduct the sum of 10*s.* for the future rates, and refund it for the past. The award went on to direct, that as a dispute was made with regard to the quantity of the lake occupied by the said *W. Thorpe*, the quantity thereof should be ascertained by the parish, and the rate altered accordingly agreeable to the price per acre, as set against the said lake, by them (the arbitrators) in schedule (A). A deduction of 5*s.* a rate was ordered in favour of *E. Thorpe.*

The plea concluded as follows: "And the defendants in fact say that the award is bad and void in law, and this they are ready to verify."

Demurrer: alleging for cause, that the award is good and sufficient in law, and that the plea attempts to put in issue to be tried by a jury, matter of law; namely, the sufficiency or insufficiency of the award; and that the defendants ought to have demurred instead of pleading the insufficiency of the award.

Erle for the plaintiff, supported the demurrer in last term. The conclusion of the plea is incorrect. [Lord *Abinger* C. B. Is the declaration good?] Admitting that the parish officers had no power to submit the rate to arbitration, and that the award is so far invalid, yet that part is good which directs the defendants to pay the costs of preparing for the appeal, and the costs of the arbitration. Even that part of the award which regards the main part of the submission, is not wholly inoperative, for the court will see a good consideration for that part of the submission by the parish officers, as well as a distinct and lawful purpose in it, viz. to obtain the judgment of fit persons on a proper scheme for rating the parish in future. The award sets forth that judgment and opinion of the persons selected as referees, though it is of no force as to the particular rate itself. Besides, there is a further consideration for the submission by the parish officers, for they derive benefit from the agreement of reference, inasmuch as the appeal is abandoned by the plaintiff at their instance, and the referees might have awarded that the costs incurred by the parish officers should be paid to them. The award, therefore, is good as to a

Cully for the defendants. Lord Chief Justice

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Abbott in *Biddell* v. *Dowse* (*a*) said, that if a submission fails as to one important part, it cannot stand as to the residue. That is the true rule, and is decisive to avoid this award in toto. For where several matters are submitted to arbitration, by an instrument not under seal, and the obligation on one side to abide by the award depends on the single obligation of the other to do so as to all the matters submitted, then if it turns out that as to one of them the submission cannot be good, but must be void on account of its not being a legal subject-matter of reference, neither party can be called on to perform that award. The plaintiff was bound to prove all the consideration laid for the defendant's promise, viz. that there should be an award concerning all the matters submitted. Then if it appear that any part of the consideration is void in law, the consideration altogether fails. Here, as the reference of the rate was illegal and void, the same consequence follows as to the award. Here, the consideration consisted of several distinct matters, and it was necessary to sustain all of them, which distinguishes this case from that where the consideration is entire, and the promise only is to do several things, in which case the contract would bind as to that part which can be performed, notwithstanding another part cannot be executed. The award is equally fruitless as to the costs of preparing for the appeal, which resemble the costs of a cause which is referred, and are at utmost merely incidental to the main question submitted. Had the appeal been heard, these costs would have been decided on by the quarter sessions, as mere accessories to it. They are not such a distinct subject-matter of reference, as would per se uphold the award as to so much. Besides, the award is

(*a*) 6 B. & Cr. 266.

uncertain in not directing on what account the 16*l.* 12*s.* is to be paid to *Fisher*, and omits all direction as to the counterpart of the agreement.

Erle replied. *Biddell* v. *Dowse* does not apply, for the object was there to get rid of a chancery suit, and as the infancy and coverture of some of the parties to that suit prevented them from being bound by the submission, the whole object failed. Here, much of the expense respecting the appeal could not be recovered at all by either side, and it was an object that the referees should determine who ought to pay it.

Cur. adv. vult.

The learned judges differed in opinion, and in this term delivered their judgments seriatim.

BOLLAND B.—The question in this case is raised by a demurrer to the plea. The action was brought by the plaintiff upon an award, and it will be necessary for me to refer fully to the pleadings. After stating the declaration, the learned baron proceeded. The defendants in their plea admitted the submission and award, and set both out fully, concluding, (and the defendants in fact say, that the award is bad and void in law, and this they are ready to verify). It does not appear to me that the plea is objectionable either in substance or form, but that the question the court has to decide is, Whether the award can be supported? and I am of opinion it cannot. Much the greater part of the subject-matters referred are such as the parties could not by any agreement between themselves, without the intervention and authority of the justices in quarter sessions, submit to the decision of arbitrators. I am aware that appeals against poor rates, where the

PARKE B.—The plea is good in point of form and substance. It admits the submission and award so far as stated in the declaration, but sets out both at full length, and thereby raises a question, whether the award be valid in law. The conclusion, which is objected to as referring matter of law to the jury, is either the statement of an inference of law from the premises, as if it had said, "and so the defendants say that the said award is bad, and void in law," or it may be rejected as surplusage.

The question then to be decided is, whether the award, compared with the submission, be void altogether.

The submission is of three things.

First, the examination of the rate and all matters in dispute, as stated in the notices of appeal; the object being to settle and ascertain the subject of the poor's rate, and the equality or inequality thereof, so far as relates to the charges on *William Thorpe* and *Edward Thorpe* respectively, compared with other individuals named in the notices of appeal.

Secondly, the expenses on both sides of the agreement, counterpart, and notices of appeal, and preparations to resist the same; and there is the usual clause, so that the arbitrators should make their award and determination of and concerning the premises, which include both these matters, at a certain time; and thirdly, there is an agreement that the costs of the arbitration and award should be in the discretion of the arbitrators.

It was argued by the learned counsel for the defendant, that the whole award was void, because the churchwardens and overseers had no power to bind themselves or the magistrates at quarter sessions, existing or future, by such a submission; and that the submission and award were in this respect wholly nuga-

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tory; and the other questions being merely ancillary to this, the whole award was void.

On the part of the plaintiff, it was not disputed that neither the churchwardens and overseers, nor the magistrates, were bound in this respect by the award; but it was nevertheless insisted, that the award was good as to the other matters in difference; that in construing contracts, the parties to them must be assumed to be cognisant of the law, that no binding settlement of the rate could be made by the arbitrators; and that they must therefore be intended to have submitted that question, so far as by law it could be; and that the special manner in which the defendants have bound themselves, is a confirmation of that view of the case. The defendants must therefore be taken to have agreed, in consideration of the plaintiff and *Edward Thorpe* agreeing to withdraw their notices of appeal, and join by employing the arbitrators to make a valuation of the property in the rate, so far as related to the comparative amounts assessed on the plaintiff, and the other persons named, to abide by their award on the question as to the costs of preparing to litigate the rate at the quarter sessions, and the expenses of the agreement to refer to arbitration; and it is contended that such a contract is good in law. It appears to me that this view of the case is right, and that the agreement of submission is valid and binding, for the reasons thus stated in the argument on behalf of the plaintiff.

There is no doubt that if the parties had both agreed to withdraw the notices of appeal, and to abandon all objection to the validity of the rate, they might also have agreed to leave to arbitration the question, which of the parties should pay the expenses of the preparation for the appeal; and if this be a fit subject of reference, can such a reference be rendered invalid by uniting it with an agreement, that the arbitrators

are to make a valuation for their information and guidance? I should say that it cannot.

The case of *Biddle* v. *Dowse*(*a*) is distinguishable. There some parties to the reference were not bound at all; and unless they were, there was no mutuality. Here, they are bound on both sides; both have agreed, and the only question is, what is the meaning of the contract between them; and I must say, that I think the reasonable and proper construction of the contract is, not that the arbitrators should do what both parties must know by law to be impossible, but that which they can do; that is, merely to make a valuation as a guide to the parties for their future conduct. This is the only doubtful part of the contract; for the residue is clear, and admitted on both sides, viz. that they should determine and decide the other questions.

I am of opinion, therefore, that the award is not void on this ground. In the course of the argument, however, two other objections were suggested at the bar, or from the court, which at the time appeared to me to be of considerable weight, but which on subsequent reflection I do not think ought to prevail.

First, it was stated that the submission is conditional, with an *ita quod*, so far as relates to the settlement of the rate, and to the expenses of the agreement and notices of appeal; and admitting that the construction which I have put on the submission was correct, and that the churchwardens and overseers are not and could not be legally bound by the settlement of the rate by the arbitrators, and that the award is therefore, as to its legal consequences in this respect, void, yet the final settlement of the rate in respect of the proportions mentioned, by a complete and perfect valuation, is a matter which the parties have stipulated

(*a*) 6 B. & Cr. 255.

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for, and made their submission to the award in any respect conditional, on such a valuation being in fact made, and the other questions submitted finally determined; and it is said that such complete and perfect valuation has not been made; for it appears by the award that they have left the *quantity* of the lake *occupied* by the plaintiff, on which the amount of the rate in part depends, unsettled.

But I think that the construction of this part of the award which is set out on the plea, unexplained by any averment on the record, is, that the whole lake is occupied by the plaintiff; and the only matter deferred is its actual measurement, which is a mere ministerial act, and which, even where a matter is referred to be finally decided by arbitrators, and not simply a valuation to be made, may be delegated to another, *Winch and Saunders'* case (*a*). The award therefore appears to me, not to be void in this respect. A second objection was, that the award is void, as the amount of the costs to be paid by defendant on account of the plaintiff's expenses of notices of appeal, as well as of the agreement or counterpart, is unascertained.

The award directs the defendants to pay to *T. E. Fisher*, the attorney for the plaintiff, and *E. Thorpe*, the sum of 16*l.* 12*s.*, his bill already delivered, and also *Fisher*'s charges [of, quære] attending the arbitration, and of procuring the signatures of his clients, and the other parties to the enlargement of time, which latter charges are not ascertained. As there is a stipulation that the submission is to be made a rule of the court of King's Bench, the amount of these last costs may be taxed, and therefore it is no objection that it is not settled by the arbitrators themselves; and as to the bill of Mr. *Fisher* for 16*l.* 12*s.* that must be considered as

(*a*) Cro. Jac. 584; 2 Roll. 214, S. C. See Palmer, 110. 146; Willes, 66.

being on account of costs relating to the notices of appeal, because as the award is made de premissis, and the context shows the costs of the agreement and the reference not to be included in the 16*l.* 12*s.*, the court ought to intend that this sum is for one of the matters submitted, and therefore is for the costs of the notices; according to the rule laid down in *Rose* v. *Spark* (*a*), that these words have the effect of applying the general words of the award to each particular thing submitted. And though the amount of the plaintiff's share of that sum is unascertained, yet as the 16*l.* 12*s.* is stated to be for a bill already delivered, the sum due from the plaintiff to his attorney might easily be ascertained by reference to the bill, and therefore the award is sufficiently certain in this respect. I am therefore of opinion that the plaintiff is entitled to judgment.

Lord ABINGER C. B.—I am of opinion that in this case the plea is good, and that the award and submission are bad. I shall give the grounds for my opinion very shortly. The submission to arbitration recites, that the plaintiff conceiving himself to be overrated, by means of the rate made upon him, had given notice of appeal, specifying in such notice the grievances complained of. The parties entered into an arrangement on this occasion. Now I do not mean to state that if the notice of appeal had been withdrawn upon collateral grounds, and the question of costs had been the only remaining question to try between the parties, that question might not have been referred to some arbitrator to ascertain what was the amount of the costs which each party ought to pay; but in this case the agreement of submission to arbitration shows that

(*a*) Alleyn, 51; and 1 Saund. 324.

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the cause of difference was a cause which could not be made the subject of a submission to arbitration, because it recites it to be the amount of the rate, and that it is which these parties propose to refer, and which the churchwardens and overseers consent to refer, so far as in law they can. It appears to me that the costs are merely incidental to the subject-matter in dispute; they arise incidentally out of the general subject-matter of the reference. Now it can never be supposed that a party intends to bind himself by an arbitration respecting a matter incidental to that which was the real point in dispute, when the latter wholly fails. It has always appeared to me that the submission to an arbitration is in the nature of a contract founded on a consideration of a final and valid determination of all the matters described in the bond of submission; and therefore I have always been of opinion, that if the main part of the object of the arbitration fails, either by its being illegal to refer it, or by reason of any other cause of failure, then the whole submission is void. That doctrine is the foundation of the decision which has been referred to in *Biddle* v. *Dowse*. It is very true, that that case is not exactly similar to this, but the principle is the same. It was there determined, that as the object of the parties could not be obtained by the reference, by reason that certain infants ought to have been made parties, who could not be so made by law, the object the parties had in view failed, and therefore the whole submission was void. That was distinctly laid down in that case, and that principle is applicable to the present, the parties here intending, as far as they could, to refer that which it turned out was not in law capable of a reference, namely, the rate. The costs incidentally arising out of the matter submitted, never could have been meant to be made the subject-matter of reference alone. The considera-

tion for the submission therefore fails. If a man refers all matters in difference, and it turns out that they are not properly referred, the submission is a nullity, and he is not bound by the award. On these grounds I think the submission to arbitration is void, and I think also that the award itself is bad. It directs that the overseers and churchwardens shall return 10*s.* back on each rate, and goes no further; that is clearly not binding upon them, they cannot do it by law, and there is no power to make them obey it at all. The award on this therefore is of no avail; and yet this is a material point referred. Then the arbitrators direct that the quantity of the lake occupied by the plaintiff should be ascertained by the parish. Now what is the meaning of the word "parish?" That is left in doubt. It may mean the churchwardens and overseers, or it may mean that the parishioners themselves are to make the settlement. It seems to me the matter is left so much in doubt, that it cannot entitle the parties to any benefits from the award of the arbitrators. Supposing then the parish were disposed to accede to the adjustment pointed out by the arbitrators, the parties cannot have the benefit of the award, as the parish are no definite persons, and could not set out the quantity of property occupied by the plaintiff. It is said by my brother *Parke*, and undoubtedly if that were so I could go along with him, that he considers this to be in substance only an agreement to refer the matter in dispute to the arbitrators to make a valuation of the property in the lake on which the rate is to be made, which may be afterwards adopted by the parish officers or not: but the proper mode to make a valuation of a parish, is to assess the parishioners equally, and if there be any dispute as to the rate, the quarter sessions ought to settle it. It is a common practice to arrest the adjudication at sessions, until the parties

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have an opportunity of making a new valuation; but the validity of that depends on the sessions adopting it, and not upon the opinion of an arbitrator. I do not think that this was a subject on which an arbitrator was competent to award. On these grounds it appears to me that the award is bad, and that judgment ought to be for the defendants.

Judgment for the defendants.

A writ of error having been brought, the case was argued in the Exchequer Chamber, after *Easter* term 1836, before Lord DENMAN C. J., with PATTESON and WILLIAMS Js. of the Court of King's Bench, and VAUGHAN, GASELEE, and BOSANQUET Js. of the Court of Common Pleas, by *Erle* for the plaintiff in error, and *Kelly* for the defendants. It is unnecessary to repeat their arguments.

Lord DENMAN C. J.—The difference of opinion which has taken place in the Court of Exchequer, has required that we should give this case our deliberate consideration, which we have done. I have felt a wish on my part that this agreement should be upheld, because, in my opinion, matters of this nature would be much better decided by persons residing in the neighbourhood, and acquainted with the nature of the property, than by the judgment of any court. We are by no means of opinion that such an arrangement as this would not be binding, if properly entered into (*a*); but we do not think that we can put such a construction upon this agreement, as to consider it valid. It cannot be denied that the real question submitted, was the vali-

(*a*) *Patteson* J. said, that without doubt the contract might have been so shaped as to be legal, *e. g.* if the costs had been left to the decision of the arbitrators, and they had been also directed to give their opinion as to the validity of the rate, as regarded its present amount, and the principle on which it should in future be assessed.

dity of the poor rate. Now that being the consideration for the agreement and the promise of the defendants, it appears that the arbitrators have been empowered to do what is not lawful to be done.

An attempt was made, with great ingenuity and force, to make out that other matters were properly submitted, one of them being the principle on which the future rates should be imposed; the other, the costs incurred in preparing for the appeal.

With regard to the principle on which future rates are to be made, no obligation is entered into at all; and with respect to the costs, they are merely accessory to the other matters submitted. In any way of looking at this case the consideration is untruly stated; for if any thing is stated to be referred to the arbitrators, which they had no authority to decide, the consideration is untruly stated. It is not necessary to enter into the examination of the other objections which are mentioned in the report of the judgment of the court in the court below.

We therefore think that this was no binding agreement, and that there was no right of action against the defendants.

Judgment affirmed.

BATE *against* BOTTEN.

An appearance irregular as to the parties' names,

A RULE to set aside a judgment of non-pros for irregularity, with costs. The writ of summons was entered in due time. The defendant, on receiving notice from the plaintiff of the mistake, promised to correct it; but afterwards, at the end of the next term after service of the writ, entered a new appearance in a fresh book, and having demanded a declaration, signed judgment of non-pros for not declaring in due time. The court set aside the judgment without costs, saying, the irregular appearance might have been amended in the book.

A defendant has till the end of the term after service of the writ to enter an appearance, if the plaintiff does not do so for him within eight days after such service, pursuant to stat. 2 *W.* 4. c. 39. Schedule No. 1.

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was served on 4th *November*, an appearance was entered in due time, but the names of the parties were mistaken. The plaintiff's attorney having given his adversary notice of the mistake and to amend it, he promised to search the book and correct it. Instead of which, before the end of the next term, viz. on 30th *January*, he entered a new appearance in a fresh book, and having given the plaintiff notice and demanded a declaration, signed judgment of non-pros for want of a declaration in *Easter* term. In support of the judgment this was contended to be regular, for the defendant could not alter the original appearance in the book; at all events the judgment is not irregular. Against the judgment it was urged, that the promise to correct the appearance was a trap to get over the eight days, for the defendant himself has till the end of the next term after service of the writ to enter his fresh appearance, where the plaintiff does not enter it for him in the eight days. [*Parke* B. assented.]

Lord ABINGER C. B.—The best course in this case will be to set aside the non-pros without costs.

PARKE B.—The plaintiff is not informed that a new appearance was entered. The officer certifies to us, that in such a case as this the old appearance would have been corrected in the book.

Rule absolute without costs.

R. V. Richards for, *John Jervis* against the rule.

See this case in a further stage, Tyr. & Gr. 148.

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DRAKE and Another *against* BROWN.

A defendant applied to a judge at chambers, to order a third party to appear and maintain or relinquish his claim to the subject-matter in suit, and in the meantime to stay proceedings under 1 & 2 *W.* 4. c. 58. s. 1. Instead of directing an issue, the judge, by consent of the parties in the cause, and a third party an administratrix, made an order referring the cause to arbitration. The third party afterwards applied to the court to vary the order, by introducing a fresh direction to the arbitrator, in consequence of some admission of the defendant since the meeting at chambers, which went to fix his liability to a claim by the third party, and to establish his defence to the action by the plaintiffs. The court refused to grant even a rule nisi without the defendant's consent.

AN application was made by the defendant herein, under sect. 1. of the interpleader act, 1 & 2 *W.* 4. c. 58. to a baron at chambers, who, by consent of all parties, referred the cause to a barrister instead of directing an issue according to the act. The matter referred was, whether a sum, paid by the plaintiffs into the defendant's hands, in order to be paid over to an intestate's estate, but which payment the plaintiffs had since countermanded, was due from the plaintiffs to the estate of the intestate or not. The administratrix of the intestate was a party to the agreement made at chambers.

Wightman applied on her behalf to vary the order, by adding that the arbitrator should inquire whether the defendant was not, at all events, liable to the administratrix for the amount received by him from the plaintiffs; and that if he found that he was so liable, that the administratrix should not be bound by the order. She swears, that at the time of the meeting before the judge, she was ignorant of a fact she had since heard from the defendant, viz. that he had carried the money to the intestate's credit in his books, before the plaintiffs countermanded their order to him to pay it over to the intestate. That admission strips the defendant of the character of a mere stakeholder, and makes him liable, at all events, to the administratrix; and his act in crediting the intestate's estate as against himself before the countermand by the plaintiffs, precluded him from the right of setting up the jus tertii. He cited *Dixon* v. *Yates* (*a*). [Lord *Abinger* C. B.

(*a*) 5 B. & Adol. 313.

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It is sought to vary this order and enlarge the arbitrator's power. How can we do either but by consent? *Alderson* B. Unless parties consent, the only way you can give us jurisdiction, is by moving to set aside the order, unless they will consent to suffer the arbitrator to inquire into this additional fact. We cannot compel them so to consent, and their refusal to do so would be an answer to such a motion.] The administratrix having taken out administration very shortly before consenting to the reference, could not know her rights. Nor would the defendant be made to pay twice; for if he is liable to the administratrix, he has an answer to the plaintiffs, that he acted on their order before their countermand arrived.

Lord ABINGER C. B.—The administratrix, who makes this application, consented to the reference suggested at the meeting before the judge, and now requests us, by altering the terms of reference, to enable her to fix the defendant with liability, though equitably speaking he may not be subject to any, and the plaintiffs may not be at all indebted to the intestate's estate. For the question is, whether they really owed money to the intestate. She may have no title to it whatever as against them; then if her account is correct, and any thing equivalent to paying over to the intestate the money paid to the defendant on the intestate's account has been done, the defendant has a clear defence to this action; but we must not let in the administratrix to try to fix him with liability to her, for some slip which would not destroy his defence in the present action. Transiit in rem judicatam. If she was not aware of her exact position, she should have applied to postpone entering into the agreement for a submission till she had learnt her rights.

BOLLAND B. concurred.

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ALDERSON B.—To interfere in any way after all parties have agreed to refer a case on certain terms, would be to do what is improper, and to make a dangerous precedent.

Per Curiam.—Rule refused.

VERRAL *against* ROBINSON.

In trover for a chaise, it appeared that a third person had hired it from the plaintiff, and afterwards left it for sale at the defendant's repository for carriages in the city of *London*. While there it was attached by process out of a city court against the third party; after which the plaintiff demanded it from the defendant, who refused to deliver it, on the ground that it had been so attached, and that he should be liable for its value if he gave it up:—Held, that

TROVER for a chaise. Pleas: first, not guilty; secondly, that the chaise was not, at the time of the supposed conversion thereof by the defendant to his own use, the property of the plaintiff, in manner and form &c. Issues on both pleas. At the trial at *Westminster* in this term before *Parke* B. the plaintiff had a verdict on the second issue, but the learned baron being of opinion that there was no evidence of conversion, directed a verdict for the defendant on the first. The proofs were as follows:—The plaintiff was a coach proprietor, and the defendant the owner of a carriage repository in the city of *London*. One *Banks* hired the chaise from the plaintiff, and left it with his own horse at the defendant's repository for sale: while the chaise remained there, it was attached, in an action against *Banks*, in one of the city courts, and the defendant, on that ground, twice refused to deliver it up to the plaintiff on demand, though on one occasion *Banks* was present and admitted it to be the plaintiff's property. The defendant asked time to consider whether he should give it up, but finally refused to do so.

there was no evidence of a conversion of the chaise by the defendant to his own use, it being at the time of the demand in the custody of the law, and the defendant refusing on that ground for his refusal.

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Humfrey (by leave of the learned judge) moved to enter a verdict for the plaintiff on the first issue. A clear demand and refusal having been proved, there was evidence of a conversion. [Lord *Abinger* C. B. The defendant relied on an attachment being lodged against the chaise out of a city court, as his reason for not delivering it up.] The defendant was bound to deliver it up to its right owner, though the attachment prevented him from giving it up to *Banks*, the defendant in the city court, who had deposited it with him.

Lord ABINGER C. B.—The defendant's refusal to deliver the chaise to the plaintiff, was grounded on its being on his premises in the custody of the law. That is no evidence of wrongful conversion to his own use. After it was attached as *Banks*'s property by the process of the city court, it was not in the custody of the defendant in such a manner as to permit him to deliver it up at all: and he assigned as a reason for not giving it up to the plaintiff, that it was in the custody of the sheriff's officer under the attachment, and that if he gave it up he should be bound to pay its value to the creditor of *Banks*.

BOLLAND B.—This was an attachment from the sheriffs' court. They are generally in the mayor's court. Had the defendant put in bail the original action in the sheriffs' court would have been tried: but as no bail were put in, the record would be made up and all parties would argue their respective claims in the sheriffs' court.

ALDERSON B.—Though the chaise was on the defendant's premises and in his hands at the time the plaintiff demanded it, it was there in the custody of the law. Had the defendant delivered it as requested,

he would have been guilty of a breach of the law. The defendant was not informed that it was not the property of the party who left it with him, till after an attachment had issued against that party, so as to make the defendant's possession the custody of the law.

Rule refused.

EARDLEY *against* STEER.

A cause in the stage after appearance and before plea, was referred to arbitrators, with all matters in difference between the parties, the costs of the cause, as well as of the reference and award, to abide the event of the award. It appeared before the arbitrators, that the defendant had a larger cross-demand against the plaintiff than the plaintiff could establish in the action.

WHEN this cause had arrived at appearance, it was referred, with all matters in difference between the parties, to two arbitrators; the costs of the cause, and of the reference and award, to abide the event of the award. The submission recited that this action was pending between the parties, and that the defendant had a cross-demand against the plaintiff for a sum of money exceeding the plaintiff's claim. The award directed, "that the action should cease and be no further prosecuted, and that on the balance of accounts exhibited, the sum of 661*l.* was due from the plaintiff to the defendant, and that the plaintiff should pay that sum to the defendant."

In last term *Erle* obtained a rule to set aside the award, principally on the ground that it did not finally determine the action, and relied on *In re Leeming* and *Fearnley*, where an action of replevin was referred to arbitration before trial, "the costs of the

The award directed that the action should cease and be no further prosecuted; that on the balance of accounts 661*l.* was due from the plaintiff to the defendant, and that the plaintiff should pay that sum to the defendant. It was argued that as this award did not state that the plaintiff had no cause of action against the defendant, no event was found which the costs might follow, so that the award was not final:—The court held, that it sufficiently showed the decision to be in favour of the defendant, and accordingly refused to set it aside.

The arbitrator could not order a verdict to be entered. Per *Parke* B.

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action to abide the event of the award;" and the arbitrator awarded "that 6*l.* was due from *Leeming* to *Fearnley* for rent at the time of the distress, which sum *L.* should pay to *F.*, and that the action should cease and be no further prosecuted (*a*)." This award was held not sufficiently final, because the arbitrator had no power to order a stet processus, but was bound finally to determine the action in favour of one or other party, or it could not be ascertained how the costs, which were to follow the event of the action, were to go. The judges said, it did not appear from the award that the action of replevin was not maintainable, for though the suit was put an end to, the event was in favour of neither party. And the award was only suffered to stand on the defendant consenting that it should be amended by entering a verdict (*b*) for the plaintiff in replevin, if required, and that the costs of the replevin suit should be paid to the plaintiff.

Sir *William Follett* and *Newman* showed cause. This award is sufficiently final; *Pearse* v. *Pearse* (*c*). The terms of the submission in *Leeming* and *Fearnley* are

(*a*) 5 B. & Adol. 403; 2 N. & M. 232, *S. C.* The award of a stet processus, though sufficient in general references, (*Blanchard* v. *Lilley*, 9 East, 497; *Pearse* v. *Pearse*, 9 B. & Cr. 484,) and in cases where the costs of the action are in the discretion of the arbitrator, seems no final termination of the suit, where (as in the principal case) the costs are to abide the event. See Watson on Awards, 2d edit. 177, 178.

(*b*) In *Grundy* v. *Wilson*, 7 Taunt. 701, cited Tyr. & Gr. 473, several issues in replevin were referred to an arbitrator after notice of trial given, but *before trial*, with power to direct respecting them and the costs *in like manner as if the cause had been tried*, with costs of the reference and award in his discretion. The arbitrator found three issues for plaintiff and one for defendant, and awarded him a sum for rent, without ordering a verdict or judgment to be entered; and the court held, on motion to enter final judgment for the rent and costs taxed, that by no possibility could it be so entered.

(*c*) 9 B. & Cr. 484.

exactly similar to those of this case, viz. to abide the event of the award; and the awards are in both cases of a stet processus; but that decision proceeded on the supposition, that by the submission the costs were to abide the event of the *action* (*a*), whereas here they are expressly made to abide the event of the *award*. [*Parke* B. That must mean the event of the action referred (*b*) as determined by the award. Had the words been event of the action, it could only mean its event as produced by the arbitrators' award.] The action is finally determined by the award as far as the arbitrators had power to do so, for as it had not got to plea, all which could be directed was, that it should cease. [*Parke* B. The arbitrators could not direct a verdict to be entered (*c*).] Besides they have awarded a balance to be paid by the plaintiff to the defendant.

Erle and *J. B. Greenwood* contrà. The principle of *Leeming* and *Fearnley* is expressly in point; that case had gone no further than avowry; in this there has been only an appearance. This action is determined neither way, nor does it appear which party is to pay or have the costs. That should have been directed. [Lord *Abinger* C. B. How were the arbitrators to determine in favour of the defendant, except by directing that the action should cease? They could not mean to give costs to the plaintiff to be paid by the defendant. *Parke* B. Perhaps the correct way would have been to have awarded that the plaintiff had no cause of action against the defendant (*d*); but that finding may be

(*a*) See per *Parke* B. 5 B. & Adol. 404.

(*b*) See 2 Nev. & M. 234, *Leeming* v. *Fearnley*.

(*c*) See *Harding* v. *Forshaw*, Tyr. & Gr. 472; but see *Leeming* v. *Fearnley*, as reported in 2 N. & M. 232.

(*d*) See *Thornton* v. *Hornby*, 8 Bing. 18.

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collected from the submission and award. You argue that the arbitrators were not only to determine the event of the action, but to say which party is to have and which to pay costs. The submission recites, that the defendant claimed a set-off to the action. The award is tantamount to expressing that it is in favour of the defendant.] Consistently with the award, the plaintiff might have been indebted to the defendant in 661*l.* on equitable claims, which could not have been the subject of set-off. [*Parke* B. It does not appear on the submission, that any but legal matters were referred. There is no trace on the affidavits that a single equitable matter came before the arbitrator, and we cannot assume that there did.] *Pearse* v. *Pearse* is a different case, for dismissal of a bill in equity is without doubt a determination of the suit. Nothing in the award is equivalent to a determination of it in favour of the defendant, had the action gone on. *Thornton* v. *Hornby* (*a*), decided before *Leeming* and *Fearnley*, shows that the event is ascertained so as to make the award available by attachment. A later case of *Norris* v. *Daniel* (*b*) is the same way. [*Alderson* B. That case was cited and much questioned in this court in *Dibben* v. *Marquis of Anglesey* (*c*). *Parke* B. The ground on which the case last mentioned proceeded was, that as to the smaller issues, on which neither party had requested the adjudication of the arbitrator, they were in the same state as if a juror had been withdrawn as to them.]

Lord ABINGER C. B.—In *Leeming* and *Fearnley* the defendant had avowed in replevin, and the award, that

(*a*) 8 Bing. 13. (*b*) 4 M. & Scott, 383; 10 Bing. 507, S. C.

(*c*) 4 Tyr. 942; also reported by Mr. Bingham in the Common Pleas Reports, 10 Bing. 568. See *White* v. *Shipton*, K. B. 21st Jan. 1834.

he plaintiff should not proceed in the action, without saying whether the defendant should pay or eceive the costs of that action, was held not final, ecause it did not dispose of the merits. The terms sed by the arbitrators amount to a finding that the laintiff had no cause of action. The courts at *Westinster* should not expect from arbitrators the use of very technical expression which legal ingenuity may uggest; but, if they can see what is meant by an ward, should give effect to it. This rule should in ny opinion be discharged. [His lordship was sitting n equity on a subsequent day, when the case was finally rgued and disposed of.]

PARKE B.—I am of opinion that this rule ought to e discharged. The most tenable objection to the ward was, that it was not final, inasmuch as it did ot expressly decide the action in favour of either arty. That position was mainly rested on in *In re Leeming* and *Fearnley*, and *Norris* v. *Daniel*. The irst was an action of replevin, and I think it may be ollected from the reports, that there were some pleadngs on the record which made an express adjudication n the fate of the action necessary. The lessor might ave avowed for rent of a greater amount than that to hich he afterwards, before the arbitrator, proved himelf entitled (*a*); so that the action might have been aintainable, though some rent was due to the landord, as was stated on the face of the award. The udgment may have turned on that ground. But in he present case, we may collect on the face of this ward, that the suit was ended and determined in avour of the defendant. The arbitrators had not only o determine the suit, but also to say who was the suc-

(*a*) See quoad hoc, the report in 2 N. & M. 282.

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cessful party in the action in whose favour the balance was to be awarded. This is done in effect by the clause which directs a sum of money to be paid by the plaintiff to the defendant. Whether the arbitrators have sufficiently shown who is to pay the costs of the action, depends on the question whether they have sufficiently determined the event upon which the costs were to follow (*a*); and I am of opinion that it sufficiently appears from the award that that event was intended to be decided in favour of the defendant. It does not appear from the recitals in the submission, that the matters in dispute were of an equitable nature, but, on the other hand, that they were legal. The correct form would have been, to have awarded that the plaintiff had no cause of action against the defendant, and then to have ordered a stet processus, as the arbitrators could not enter a verdict (*b*); but they seem to have in effect said, that the suit should be no further prosecuted, because the plaintiff had no cause of action. *Norris* v. *Daniel* is very different, for several counts in that declaration were not adjudicated on. The facts of *Thornton* v. *Hornby* are not stated very precisely; however if the defendant should apply to enforce this award by attachment, we may perhaps decline to interfere, as was done in that case; but the award is not so defective as to justify our setting it aside (*c*), for it is sufficient if, from the whole of it, it can be collected that the matter is determined (*d*). The other objections to the award were disposed of by the affidavits in support of it.

(*a*) *Semble*, not necessary to award costs in terms, where, as in the principal case, the costs were to follow the event of the award. See *Jupp* v. *Grayson*, and *Yates* v. *Knight*, 2 Bing. N. C. 277; *ante*, 150.

(*b*) See p. 1073, note (*e*).

(*c*) See *Scott* v. *Williams*, *ante*, 506.

(*d*) See *Jackson* v. *Yabsley*, 5 B. & Ald. 848.

BOLLAND B.—This award might have been better framed; but looking at the whole with the submission, and the affidavits on both sides, I do not see enough on which to set it aside.

ALDERSON B.—*Thornton* v. *Hornby* is inaccurately reported (*a*), and does not resemble this case. This award may, in my opinion, be supported.

Rule discharged with costs (*b*).

(*a*) N. B. The report of this case in 1 Moore & Scott, 48, had not been cited.

(*b*) See *Yates* v. *Knight*, 2 Bing. N. C. 277; and *Day* v. *Bonnin*, 3 Bing. New Cas. 219.

COCK *against* COXWELL.

On a plea in an action on a bill of exchange, that the defendant never accepted the bill in the declaration mentioned, the defendant may give in evidence the alteration of the bill after its acceptance, and without his, the defendant's, knowledge.

ASSUMPSIT by indorsee against acceptor on a bill of exchange, dated 15th *December* 1834, payable at two months after date. Plea, that the defendant never accepted the bill in the declaration mentioned. The case was tried before the under-sheriff of *Middlesex*, and the defendant had a verdict, on proof that the date of the bill had been altered after its acceptance and without the defendant's knowledge (*a*). *Thomas* moved for a new trial. The second plea only put in issue the fact, whether the defendant accepted or not, so that the evidence of alteration after acceptance was improperly received. It is a matter in confession and avoidance, which should have been specially pleaded, as was

(*a*) See *Walter* v. *Cubley*, 4 Tyr. 87; *Jacobs* v. *Josephs*, 2 Stark. C. N. P. 45; *Sparkes* v. *Spur*, Chitty's Stamp Laws, 26; *Stephens* v. *Lloyd*, M. & Malk. 293.

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done in *Atkinson* v. *Hawdon* (a). Thus *non est factum* does not put in issue fraud or misrepresentation in executing the deed (b). He also mentioned *Barnett* v. *Glossop* (c).

Bolland B.—The plea alleges in substance that the defendant never accepted the instrument on which the plaintiff claims against him; nor can the instrument be alleged to be the same if there has been any alteration.

Alderson B.—The defence *is* pleaded specially, for the plea in point of fact alleges, that the defendant never accepted the bill which the plaintiff set out in the declaration and gave in evidence.

Gurney B.—The plea of *non est factum* would put in issue an alteration in a deed after execution (d).

Rule refused.

(a) 2 Adol. & Ell. 628.

(b) *Edwards* v. *Brown*, 1 Tyr. R. 196, 197; *Mason* v. *Ditchburn*, Tyr. & Gr. 87, note; *Connop* v. *Holmes*, *id.* 85.

(c) 1 Scott, 621; 1 Bing. N. S. 633, *S. C.*

(d) *Adams* v. *Bateson*, 3 M. & P. 339; 6 Bing. 110.

ALLIES and Others *against* PROBYN.

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Assumpsit on a bill of exchange, by indorsee against acceptor, with counts for goods sold and money due on an account stated. Plea, as to 83*l.* part, &c. that after the several causes of action in respect of that sum had accrued, the plaintiffs—by agreement with the defendant, in consideration that the defendant would secure that sum, by executing a mortgage of certain premises when called on to do so, the amount to carry interest and be payable by instalments—undertook that no proceedings should be instituted against the defendant in respect of that sum, unless default were made in paying the instalments. The plea then averred the defendant's constant readiness to execute the mortgage, but that he had never been called on to do so. Held, that the plea was bad on special demurrer, for pleading matter of accord, without alleging it by way of satisfaction.

ASSUMPSIT. The first count was upon a bill of exchange for 50*l.*, drawn by the plaintiffs upon and accepted by the defendant, payable three months after date; the second was in *indebitatus assumpsit* in 500*l.* for goods sold, and for money found to be due upon an account stated. Plea to the said declaration, so far as the same relates to 83*l.* *actionem non*, because the defendant says that before the commencement of this suit, and after the several causes of action in respect of the said sum of money in the introductory part of this plea mentioned, had accrued to the plaintiff, by a certain memorandum of agreement in writing, bearing date 14th *August* 1833, and signed *W. F. Geach*, being the agent of the plaintiffs thereunto by them lawfully authorized, in consideration that the defendant would secure the said sum of money in the introductory part of this plea referred to, by further mortgage upon a certain property at *P.* in mortgage to Messrs. *H. F.* and *W. F. Geach* respectively, and would execute such further mortgage, which should contain a power of sale of the premises mortgaged, when called upon so to do; 80*l.* parcel of the same money, to carry interest at 5*l.* per cent. from the said 14th *August*, and to be paid off by annual instalments of 15*l.*, the first payment to be made on the 14th of *August* then and now next, the plaintiffs undertook and promised the defendant that no proceedings in respect of the said sum of money in the introductory part of this plea mentioned should be instituted against the defendant, unless in case of default of paying the amount due by the said instalments. And the defendant in fact says, that although he the defendant has been always ready and willing to exe-

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cute such further mortgage as aforesaid, whenever called upon so to do, yet he hath not been called upon so to do. Verification.

Special demurrer, assigning for cause that the defendant had in his plea, as to 83*l.* parcel &c., pleaded such matters in bar of the plaintiffs' action, in respect of 83*l.* parcel &c., which in form amount merely to a matter of accord, and has not pleaded the same by way of satisfaction.

W. H. Watson was to have supported the demurrer, but the court called on

John Henderson to support the plea. The defence relied on is not accord and satisfaction, release or merger of security, but that the right of action is suspended for a limited period not yet expired, by a valid contract which still subsists. If the plea is held bad, circuity of action must take place; for the defendant may sue for the breach, by the plaintiff, of that contract not to sue the defendant for a certain time, which is admitted by the demurrer, as stated in the plea. This plea is supported by the judgment of the Court of Common Pleas in *Stracey* v. *The Bank of England* (*a*). There the plaintiff, before commencing the action, made an agreement with the defendants, upon good consideration, which suspended the right of action, and the court said, "the agreement is not set up as a perpetual bar; it is merely insisted on as an objection to the action being brought at the present time. It is urged as an agreement by which the plaintiffs have for a good consideration restrained themselves from suing, not perpetually, but only till they have first done a particular act. Under these circumstances, we think the defendants,

(*a*) 6 Bing. 754, 774; 4 M.& P. 639, *S. C.*

in order to avoid circuity of action, may avail themselves of this agreement, as a suspension of the plaintiff's right to sue in the present action, and that they are not confined to a remedy by cross action thereon." The court there cited *Longridge* v. *Dorville* (*a*) as in favour of the validity of such an agreement, to which *Tatlock* v. *Smith* (*b*) might be added. Again, *Kendrick* v. *Lomax* (*c*) shows, that the taking a bill of exchange in renewal of another induces a presumption of an agreement to suspend the remedy on the first till after the dishonour of the second. Good consideration for the plaintiffs' promise is disclosed in the plea, nor are any of the instalments yet due. Then, as an action might be supported against the plaintiff on the agreement stated in the plea, which is violated by the present action, the plea ought to prevail, in order to prevent circuity of action.

W. H. Watson in reply. This is a mere attempt to plead accord without satisfaction. Pleas of bills of exchange accepted in discharge of a prior debt due, are always pleaded to be so accepted for and on account of that prior debt. So, in cases of compositions, the security of a third person or of a certain fund must be pleaded to have been received in satisfaction; *Heathcote* v. *Crookshanks* (*d*).

Lord ABINGER C. B.—This plea is clearly bad. It appears to be an ingenious attempt to plead an accord without satisfaction. The case of *Stracey* v. *The Bank of England* proceeded on different principles, for there the contract had been acted upon. The situation in which the Bank of *England* were placed by the forgery of a third party could not be altered, for they had

(*a*) 5 B. & Ald. 117. (*b*) 6 Bing. 339; S. C. 3 M. & P. 676.
(*c*) *Ante*, Vol. II. 438. (*d*) 2 T. R. 24.

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allowed the stock to be transferred, and had paid over the proceeds to the party transferring, so that they could in no manner recoup themselves as against the persons in whose names the stock had stood, it being but just that the owners of the stock wrongfully transferred should gain what they could from the estate of the party who had so acted; and the bank accordingly agreed that if they would do so, they, the bank, would guarantee the residue, without compelling them to hazard an action against the bank. The agreement entered into was therefore perfectly fair and collateral to the action. In that case there was satisfaction, the agreement did not operate as an extinction of the debt, but as a suspension of the suit until a certain act was done by one of the parties. The plaintiffs who assented to that suspension received in return a complete satisfaction, because their debt was guaranteed by the bank. Here, there was nothing but a simple engagement to execute a mortgage when called upon to do so. If they never called upon the defendant, he could never execute at all; and then the right of action would be suspended during the plaintiffs' whole lives. All, however, that the contract amounts to is, that the plaintiffs may have the mortgage if they like; but that is not in itself a satisfaction of the previous debt. On the other hand, the original cause of action is reverted to, if the defendant is not called on to execute. If the mortgage had been executed, then the debt would have been merged; but that is not the present plea.

The other barons concurred.

Judgment for the plaintiffs.

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SCOTT, Assignee of JONES a Bankrupt, *against* LEWIS Esq., late Sheriff of CARMARTHENSHIRE.

The court will not grant a sheriff relief under sect. 6 of the interpleader act 1 *Will.* 4. c. 58., if, at the time of the motion, the goods in dispute, or their proceeds, are not in his hands, but handed over.

CHILTON moved, on behalf of the defendant, for a rule under sect. 6. of the interpleader act 1 *Will.* 4. c. 58. s. 6. The action was trover for goods of the bankrupt, seized by the defendant under a fi. fa. issued at suit of *Jones* on 29th *January* 1834, and returnable 15th *April*, indorsed to levy 2019*l.* 18*s.* 6*d.* The seizure took place on 1st *February*, the goods were sold by auction on the 10th, and on the 12th the execution creditor received the proceeds. On 12th *May* 1835, process in this action was served, which was the first notice the sheriff had of the issue of a fiat against *Jones*, or of any act of bankruptcy committed by him before the levy. The affidavit denied collusion with, or promise of indemnity by any party. In *Chalon* v. *Anderson* (*a*) it was held that the sheriff cannot apply after actually paying over the money. There, however, the sheriff had had notice of the adverse claim, which affords a substantial distinction from this case. Besides, sect. 6., which applies to sheriffs as public persons, is more general in its terms than sect. 1. regarding private stakeholders, and provides nothing about being ready to bring into court, or to pay or dispose of the subject-matter sued for, as the last-mentioned section does; though in *Chalon* v. *Anderson* the court construed sect. 6. with reference to sect. 1. But that analogy has not been held to be invariable, for in *Donniger* v. *Hinxman* (*b*), and *Dobbins* v. *Green* (*c*), *Littledale* J. held that it was not necessary for a sheriff,

(*a*) *Ante*, Vol. III. 237; *S. C.* nom. *Anderson* v. *Calloway*, 1 C. & M. 182; 1 Dowl. P. C. 636.

(*b*) 2 Dowl. P. C. 424. (*c*) Id. 509.

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THOMAS *against* MORGAN.

CASE. The declaration stated that the defendant theretofore, to wit, on the first day of *September* 1833, and from thence for a long space of time, to wit, until and at the time of the damage and injury to the said plaintiff, as thereinafter mentioned, wrongfully and injuriously did keep divers, to wit, ten dogs, he the said defendant during all that time well knowing that the said dogs then were of a ferocious and mischievous disposition, and used and accustomed to attack, chase, bite, worry, and kill cattle, which said dogs afterwards, to wit, on &c., and on divers other days &c., did attack, chase, bite, worry, and kill divers, to wit, ten bulls, ten cows, ten oxen, ten heifers, and ten steers of the said plaintiff, of great value, to wit, of the value of one hundred pounds, by means whereof, &c. Pleas: first, not guilty; second, that no dog or dogs of him the defendant, did attack, chase, bite, worry, or kill any bull, cow, ox, heifer, or steer of the said plaintiff, in manner and form, &c. At the trial before *Williams* J. at the last assizes for *Carmarthenshire*, it appeared that the defendant's dogs were ferocious, and had killed some of the plaintiff's cattle some days before the 15th *September* 1833, and worried the cattle of other persons. When the defendant was told on 18th *September* that his dogs had killed the plaintiff's cattle, he promised to settle for the damage, provided it were clearly proved that his dogs had done it. One *Protheroe* deposed that the defendant's dogs had worried his cattle, and that he complained of it to the defend-

Case for keeping dogs, well knowing them to be used to attack, chase, bite, worry, and kill cattle &c., and which bit, worried, and killed the plaintiff's cattle. Plea: general issue. —Held, that this plea put in issue the scienter, being of the substance of it, and not mere inducement.

Proof that the defendant's dogs were savage, and had bitten the cattle of other persons besides the plaintiff, is not evidence that the defendant knew they were accustomed to do so.

The defendant's saying, that if his dogs had bit the plaintiff's cattle, he would pay the damage, was some evidence of the scienter; but so very slight, that though not left by the judge to the jury at the trial, the court refused to enter a verdict for the plaintiff upon it.

The savage acts of dogs are not to be left to the jury as evidence of their owner's knowledge of their disposition.

Abinger C. B. In the case cited, the diversion and the penning up the water was the act of the defendant or his agent; whereas in this case the act of the dogs could not make the defendant responsible, except in respect of his knowledge of their ferocious habits. In the case cited, the act of diversion was the injury complained of, and the damage to the plaintiff's mill, the damage. The plaintiff's right to the mill did not come in question. The court held, very rightly, that the mere fact of diversion was put in issue, and not the right to divert. In this case, if the defendant's dogs were accustomed to attack cattle without his knowledge, there is an end to the action, and it is damnum absque injuriâ. Therefore the scienter is part of the cause of action, and not inducement merely.]

Rule refused on this point, but granted on the other, viz. that there was evidence of the scienter, which ought to have gone to the jury.

J. Evans and *E. Vaughan Williams* showed cause in last term. The nonsuit was right, for there was no evidence that the defendant knew the habits of his dogs. The defendant paid *Protheroe* after the plaintiff's sheep were bit. That is no admission of any scienter by the defendant before his dogs injured the plaintiff. The defendant's promise to settle with the plaintiff for his cattle, if it could be proved that his dogs killed them, shows no prior knowledge of their habits, and might have been made from good feeling merely. [*Parke* B. The only question is, whether, as contended for the plaintiff, the defendant's knowledge of his dogs' habits is to be presumed from their acts. The promise to settle might have been made on the belief that the plaintiff's cattle had been killed after he, defendant, had received notice of their having killed

Judge v. *Cox* (*a*) he left it to the jury to say whether the defendant's having cautioned a person not to go near the dog lest he should be bitten, was not evidence from which to infer his knowledge that the dog had before bitten some one. [*Parke* B. There is some evidence of the scienter; but if the learned judge meant that if we thought there was some evidence of the scienter, a verdict should be entered for the plaintiff, we must do so; he may, however, have meant that we should only do so if there was substantial evidence of it. We will consult him as to the mode in which he intended the question to be left to us.]

Cur. adv. vult.

Afterwards in this term

PARKE B. delivered the judgment of the court.—This was an action against the defendant for keeping dogs accustomed to bite cattle, and which had worried and bit the plaintiff's cattle. After the cause was gone through, and when the case was about to be submitted to the jury, it was objected on the part of the defendant, that there was no sufficient evidence of the scienter to be laid before them. My brother *Williams* being of that opinion, nonsuited the plaintiff, but gave leave to move to enter a verdict for the sum of 11*l.* 10*s.*, if the court should be of opinion that the learned judge should have left the question of knowledge to the jury on the facts that were proved. Now upon the facts proved, it was urged on the part of the plaintiff, that the case should have been submitted to the jury on the question as to whether there was evidence of the scienter. One point made on the argument was, that a person of the name of *Protheroe* had had his cattle bitten by the defendant's dogs; that the defendant was acquainted with their savage nature, and had offered

(*a*) 1 Stark. C. 285.

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Protheroe satisfaction for the injury done by them; but it was stated that the transaction in question, in which the plaintiff's cattle were bitten, occurred before the transaction with *Protheroe*, and on a careful examination of the report, such appeared to be the fact. It appeared that the learned judge called back *John Jones*, who proved the transaction in which *Protheroe's* cattle were bitten, and upon his examination it appears upon the report, that this transaction did not take place before the plaintiff's cattle were bitten. We have consulted the learned judge, and find that he is satisfied of that fact, and therefore there is an end to that part of the case. It was also submitted, that the very disposition of the dogs themselves, their practice and habits, they having bitten other persons' cattle, ought to have been left to the jury, without further evidence to show that the defendant must have been aware of it. We are clearly of opinion that in this respect there was no case to go to the jury; so the learned judge thought, and we concur in that opinion. It was again submitted, that there was an offer on the part of the defendant (and which was proved on the trial) of a compromise, after the plaintiff's cattle had been bitten, in which the defendant said he would settle with the plaintiff for the cattle which had been killed. The witness said, "I told him his dogs had killed three of the plaintiff's cattle, when he said, if they had done it he would settle for it." It was argued that this ought to have been allowed to go to the consideration of the jury; that the ready admission, that if the dogs had been guilty of inflicting this injury, he would settle for it, was an acknowledgment that he knew he was liable in point of law for any damage done on account of their savage disposition; and that appears to the court to be a position which ought, strictly speaking, to have been submitted to the jury. But upon looking

at the terms in which the learned judge has referred the question to the consideration of the court, a doubt occurred to us, whether the point was ever sufficiently brought to his attention, or whether he was called upon to leave that as a question for the jury. The words in which the learned judge makes his report are these: "I thought there should be some proof of the defendant's knowledge of the mischievous nature of the dogs at the time of the mischief; and the question is, whether there was any such knowledge. Here Mr. *Chilton* contended that knowledge might be inferred from the acts of the dogs. I thought otherwise, directed a nonsuit, and gave him leave to move." It is clear from the judge's notes, that the question has not been left to the jury, whether the offer of compromise was not an admission of his liability; and the learned judge who tried the cause informs us, that he has no recollection of being called on to leave it to the jury. Now certainly the court think, strictly speaking, and we all concur in that opinion, that the evidence ought to have been submitted to the jury; but that it ought to have been submitted to them with a strong observation in favour of the defendant. Lord *Ellenborough* thought it entitled to so little weight, that he refused to leave it to the jury (*a*). But though we think, strictly speaking, it is a fact to go to the jury, yet it ought to have little or no weight at all with them; for the offer may have been made from motives of charity, without any admission of liability at all. We think, therefore, that we cannot in this case direct a verdict to be entered for the plaintiff; and it seems to us, that we ought not to send the case down to a new trial, when the fact, if it had been submitted to the jury, ought to have been submitted with such strong observations as to make it very improbable that they

(*a*) *Beck* v. *Dyson*, 4 Campb. 198.

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SEWELL moved that the plaintiff might be permitted to enter an appearance for the defendant. The affidavit disclosed, that a distringas had issued against the defendant, and the sheriff had returned that he had levied 40*s*. The officer of the court had refused to permit entry of the appearance, till the sheriff's bailiff had sworn to the due execution of the writ.

After a sheriff has returned that he has levied 40*s*. under a distringas, the plaintiff may enter an appearance without any affidavit of the due execution of the writ, for the return sufficiently shows it.

PARKE B.—By section 3 of the uniformity of process act, 2 *W*. 4. c. 39. the distringas and the notice thereto subscribed, shall be in the form mentioned in the schedule No. 3; and the notice is, that in default of the defendant's appearance within eight days inclusive after the return of the distringas, the plaintiff will cause an appearance to be entered for him. The sheriff's return is sufficient proof of the execution of the writ, whether the notice annexed to the distringas appear to have been shown to the defendant or not. This plaintiff may, therefore, enter an appearance for the defendant.

Appearance entered accordingly.

BOUCHER *against* SIMS.

THE defendant was brought up from the custody of the marshal, in order to be charged with an attachment for non-payment of costs; but, after conferring with the officers of the court,

An attachment against a prisoner in custody of the marshal should be lodged with the sheriff, who will take him on it when he is out of that custody; and it is irregular to bring him up to charge him with it.

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ALDERSON B. said, this is an improper course. The attachment should be lodged with the sheriff, who may take the defendant on it as soon as he is out of custody on the process.

Addison took nothing by his motion.

KERRY *against* REYNOLDS.

It is irregular to deliver an issue with a notice of trial indorsed for one day, and at the same time to deliver a separate notice of trial for a different day.

THE issue was delivered, indorsed with a notice of trial for the sittings after *Easter* term. The parties commenced a treaty, which went off. The issue was made up again without striking out the above indorsement of notice; but a separate notice was delivered with it to try on 15th *May*, the second day of the sittings after *Easter* term. It was tried at the sittings after *Trinity* term, and the plaintiff obtained a verdict. A rule to set aside the verdict, and for a new trial, was obtained, on the ground that the notice of trial was insufficient. Cause was shown that the defendant was not in fact misled, and was prepared to try at the sittings after *Trinity* term; but

Per Curiam.—It is certified to us, by the officers, that this is an irregularity, from its tendency to mislead. An after-question may arise as to the effect of a notice of trial contained in a separate paper, which could not be raised on a notice regularly indorsed on the issue.

Rule absolute without costs.

Wordsworth supported the rule, *Miller* showed cause.

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REX *against* ROBINSON.

A sheriff levied goods of defendant appraised at 824*l.* under crown process of extent in chief against him for penalties of 1000*l.* incurred under the excise laws. The sheriff remained in possession during a long negociation entered into with the excise by the defendant to mitigate the penalties. At last the excise accepted 500*l.*: Held, that the sheriff was entitled to poundage, not on 824*l.*, the whole value of the goods seized, but on 500*l.* only, that being the sum actually obtained by the crown.

AN order nisi had been obtained, calling on the sheriff of *Staffordshire*, or his under-sheriff, to pay over into the hands of the collector of excise for the district, for the use of the crown, 472*l.* 10*s.*, being the balance of a sum of 500*l.* levied on the defendant's goods, under an extent, after deducting 27*l.* 10*s.* for the sheriff's poundage thereon. The crown had obtained judgment against the defendant for 7000*l.*, to secure 1000*l.* incurred as penalties under the excise laws. A writ of extent was issued to the sheriff indorsed to levy 1000*l.* The defendant's goods were seized and appraised at 824*l.* The defendant then negociated with the excise for a compromise, and the sheriff remained in possession for seven weeks. The excise at last agreed to take 500*l.* in satisfaction; and the question was, whether the sheriff was entitled to poundage on the 500*l.* accepted by the excise, or on 824*l.* the value of the goods seized.

Jervis showed cause. The sheriff is entitled to poundage on the value of the goods seized. Stat. 3 *G.* 1. c. 15. s. 3. gives poundage on extents to sheriffs levying debts due to the crown, for their care, pains, and charges, and for their encouragement therein. The act, therefore, must receive a liberal construction. *Rex* v. *Jetherell* (*a*) and *Norton's* case (*b*) are analogous. [*Parke* B. Those cases only settle what shall amount to a levy. There is no doubt that there was a levy here.] *Jervis* then cited *Rex* v. *Burrell* (*c*) and *Alchin* v. *Wells* (*d*). [*Parke* B. In that latter case the sheriff

(*a*) Parker's Rep. 177.
(*b*) Lane's Rep. 74.
(*c*) Bunbury, 305.
(*d*) 5 T. R. 470.

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was held entitled to poundage, though the parties compromised before he sold the goods; but there the defendant might have given security to pay the whole debt at a future day. *Alderson* B. Mr. *Gibbs's* argument is strong to show that it was so.] Whenever the sheriff has regularly *levied* under an extent, though without sale, he is entitled to poundage, even though the extent be set aside for some other irregularity; *Bullen* v. *Ansley* (*a*), *Rawstorne* v. *Wilkinson* (*b*). The extent authorizes not a sale, but a writ of venditioni exponas.

PARKE B.—I find no authority to prove that poundage is payable by the crown on a larger sum than actually came to its hands by compulsion of the crown process of extent. *Alchin* v. *Wells* is the only case which even apparently decides, that on civil process between subject and subject, a sheriff is entitled to poundage on a greater amount than is actually obtained by compulsion of the writ which he executes; but when that case is closely looked at, it does not go to the extent here contended for by the sheriff; for all that was decided by it was, that after such a compromise as there took place, the court would not allow the sheriff to be defeated of his poundage by the private arrangement of the parties.

ALDERSON B.—The only principle upon which the sheriff is entitled to poundage, shows that he cannot claim it on more than the sum actually received. What the crown actually obtains, though not by the *direct* compulsion of the process, is considered as being in *fact* the amount "levied and collected" by the sheriff's hands. Then if that amount is the criterion

(*a*) 6 Esp. 111. (*b*) 4 M. & S. 256.

to fix the amount of the sheriff's liability to the crown, it must be so as to his demand from it.

BOLLAND and GURNEY Bs. concurred.

Rule absolute.

PAINE and Others, Executors of JAMES PAINE, *against* EMERY.

Covenant on a mortgage deed. The declaration stated the covenant to be to pay generally, and in the breach alleged a general non-payment. The defendant set out the deed on oyer and demurred specially, alleging for cause, that the covenant was to pay the principal and interest at a specified day at or in the porch of a parish church: Held, that as the plaintiff had set out the deed according to its legal effect, he could not demur to the declaration on the mere ground of variance, because the deed, when set out on oyer, became part of the declaration; but had the breach laid in the declaration appeared to be no breach of the covenant set out on oyer, that would have been ground of demurrer.

DEBT on an indenture of mortgage made between the plaintiff's testator and the defendant, whereby the defendant covenanted to pay or cause to be paid to the testator *James Paine*, his executors, &c. the sum of 100*l.*, and interest at the rate of 5*l.* per cent. per annum, on a day named next ensuing the date of the indenture. Breach: general non-payment. The indenture was set out on oyer, and showed that the covenant was to pay the principal and interest on a day fixed, at or in the porch of the parish church of *G.* in the county of *Cambridge*. The defendant then demurred specially, assigning for cause that there was a material variance between the covenant there set out and that in the deed read on oyer; the former covenanting for payment by the defendant of the money generally, and the latter only for paying it at a particular time and place; so that, consistently with the declaration, the defendant, at the time and place specified in the covenant, might have been ready with his money, and willing to pay it to the plaintiff, if the plaintiff had been there to receive it: and that it did not, therefore, appear that any

might be urged on non est factum pleaded, it cannot be taken as such on demurrer; for by setting out the deed on oyer the defendant has made it a part of the declaration. This is not a ground of demurrer, as it would have been had the covenant been so qualified, that, taking the deed as set out on oyer and the breach together, the plaintiff could not have maintained the action, *Snell* v. *Snell* (*a*), *Sacheverell* v. *Froggatt* (*b*), *Ross* v. *Parker* (*c*), *Abney* v. *White* (*d*), *Gage* v. *Acton* (*e*). Those cases show, that a mere question of variance taken per se, and not affecting the plaintiff's right to sue, is not the subject of demurrer, but only of a plea of non est factum. This breach applies to both, and is general. The plaintiff was not bound to go further. In *Rowe* v. *Young* (*f*) *Bayley* J. puts this very case by analogy; he says, "So in covenant on a mortgage deed, to pay the mortgage money on a given day at *Lincoln's Inn Hall*, or any other place, the declaration never alleges an attendance or demand by the plaintiff, but merely alleges non-payment by the defendant."

Lord ABINGER C. B.—The deed being set out on oyer became part of the declaration. It is the same thing as if the plaintiff, instead of stating the legal effect of the deed in his declaration, had set it out at length in so many words. That being so, the general breach is clearly good; for the defendant, not having paid at all, cannot have paid at the particular time and place. Had the breach alleged in the declaration been no breach of the covenant stated in the indenture,

(*a*) 4 B. & C. 741.
(*b*) 2 Saund. 366.
(*c*) 1 B. & Cr. 358.
(*d*) Carthew, 301.
(*e*) Ibid. 513.
(*f*) 2 Brod. & B. 234.

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when set out on oyer, there would have been good ground of demurrer.

BOLLAND, ALDERSON and GURNEY Bs. concurred.

Judgment for plaintiffs (*a*).

(*a*) Readiness to pay at the porch of *G.* at the time fixed, was matter only of defence, for such attendance at time or place was not part of the plaintiff's title. See *Rede* v. *Farr*, 6 M. & S. 121; 2 Brod. & B. 234.

BLUNT *against* BEAUMONT.

A count in trespass stated, that defendant assaulted plaintiff, and wrenched a stick from his hands, and with the said stick and his fists gave the plaintiff many violent blows, &c. Plea, as to assaulting the plaintiff with the said stick, and with his fists giving him blows, son assault demesne. Verdict for defendant. Held, that after verdict the plea should be read with a stop of time less than a comma after the words "assaulting the plaintiff," so as to answer to the word "and," so that the plea sufficiently justified the battery as well as the assault with the stick.

TRESPASS for assaulting the plaintiff, wrenching and pulling a stick from his hands, *and with the said stick* and with defendant's fists striking the plaintiff blows &c.. Pleas: first, not guilty; secondly, as to the *assaulting the plaintiff with the said stick, and* with his, the defendant's, fists giving and striking the plaintiff blows, as in the declaration mentioned, son assault demesne. Replication, de injuriâ. The cause was tried before *Parke* B. at the *Middlesex* sittings in this term, when the plaintiff having proved the trespass charged, the defendant produced evidence that the plaintiff committed the first assault, and that the defendant did not wrench the stick from his hands. For the plaintiff it was contended, that the blow with the stick, which he received from the defendant, entitled him to some damages, that blow not being denied or justified by the plea. The learned baron left it to the jury to assess the plaintiff's damages from that blow, which they did at 1*s.*, giving a general verdict for the

defendant. The plaintiff had leave to move to enter a verdict for the plaintiff on the point above stated.

Wallinger moved. [*Parke* B. The only question in the case is, whether the special plea justifies the plaintiff in giving the defendant a blow with a stick? Does the plea cover that part of the count?] As the plea only answers an *assault* with a stick, it does not cover the battery with the stick, which is laid in the declaration. [Lord *Abinger* C. B. The plaintiff charges a battery, not an assault. Now, the battery charged includes the assault, which the defendant says he has justified. The plaintiff describes no assault with a stick, except that included in the battery, and does not distinguish the assault from the battery. *Parke* B. The declaration does not charge an assault with a stick *simpliciter*. If it had, and no such battery had been proved, could you recover notwithstanding this plea? The plea is tied up to the assault included in the battery. Then is it not an informal justification of the assault with the stick? No other assault with it is laid.] Every authority distinguishes assault from battery, the former being inchoate, the latter actual violence. In *Page* v. *Creed* (*a*), the assault was justified and the battery denied; and a judge's certificate that an assault was proved, was held insufficient to give the plaintiff costs; *Smith* v. *Neesam* (*b*). [*Parke* B. The plea is directed to inchoate violence, though not charged by the declaration. Is it not an informal justification of actual violence?] The plea cannot be read against its natural meaning, except by introducing a word, or at least a stop.

Lord ABINGER C. B.—On special demurrer, alleging this ground for cause, it might have been argued, that the

(*a*) 3 T. R. 391. (*b*) 2 Lev. 102.

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plea was informally pleaded to the assault only; whereas the battery laid included it, according to the common rule, that every battery includes an assault. But as the plaintiff only charges an assault, consisting of beating and striking, this plea is substantially an answer to it.

PARKE B.—If in reading the second plea, the breath is suspended after the words 'assaulting the plaintiff,' the plea will cover the whole charges in the declaration, for the sentence will then be the same as if the word *and* was there, which word seems omitted by clerical error. It is only necessary to suspend the breath, not to insert a stop. It is clear the defendant meant to justify the battery with the stick as well as the assault.

BOLLAND and ALDERSON Bs. concurred.

Rule refused.

WILSON *against* NORTHOP.

A judge at chambers may order the attorney in a cause to pay a sum of money for costs, and such an order will be made a rule of court in the first instance, on motion, without a rule nisi.

RAWLINSON moved for a rule nisi to make a judge's order to the plaintiff's attorney, to pay a sum of money for costs, a rule of court. He intimated a doubt whether such an order could be made at chambers.

ALDERSON B.—The power of a judge at chambers to order the payment of costs, is that of the court, and when his order is made a rule of court, what he did at chambers becomes an order of this court.

Lord ABINGER C. B.—The rule is absolute in the first instance, without any occasion for a rule nisi.

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ROBERTS and Others, Assignees, *against* HARRIS.

A debtor compounded with his chief creditors, and paid smaller ones their debts in full, but did not call all of them together; a fiat was afterwards issued against him, on which he did not pay 15*s.* in the pound, but obtained his certificate. Held, that having released the surplus of his estate, he was a competent witness for his assignees in an action for goods sold and delivered by him before his bankruptcy. (6 *G.* 4. c. 16. s. 127.)

ASSUMPSIT for goods supplied to the defendant by the bankrupt before bankruptcy. The cause was tried before *Parke* B. at the last sittings at *Westminster;* the bankrupt was called for the plaintiffs, having obtained his certificate and released the surplus of his property. Being examined on the voire dire, he said, that before his bankruptcy he applied to all his chief creditors, with whom he thought it worth while to compound, and made a composition with them, and paid some other small creditors in full, but had not paid 15*s.* in the pound under the fiat. The learned baron held the bankrupt to be a competent witness under 6 *Geo.* 4. c. 16. s. 127., and the plaintiff had a verdict.

Mansel moved for a new trial, on the ground that the witness was incompetent. That effect follows, though the composition be not with all the creditors, if it is not in terms limited to a particular class of them. Were this otherwise, a bankrupt might always make himself a competent witness, by excluding a creditor or two from the composition. He cited *Norton* v. *Shakespeare*(*a*) and *Slaughter* v. *Cheyne*(*b*).

Per Curiam.—This was not a general composition, for the bankrupt did not call all his creditors together, but only the larger ones. He never intended or attempted to make a general composition, as the party in *Slaughter* v. *Cheyne* proposed to do, as far as he could. The witness was properly admitted.

Rule refused.

(*a*) 15 East, 619. (*b*) 1 M. & S. 182.

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JOHN HUGHES and ELIZABETH his Wife, Administratrix, *against* WILLIAMS.

An administratrix concluded her declaration with a profert of letters of administration "duly granted by the consistory court of *St. Asaph*," omitting all statement of the grant of them in the body of the declaration, and not stating any date of such grant. Held bad on special demurrer, for not showing that the letters of administration were granted by the proper authority, viz. the ordinary, or alleging that the consistory court of *St. Asaph* had a special power to grant them.

IN assumpsit on a promissory note given by the defendant to the intestate, the declaration began thus: "*J. H.* and *Elizabeth* his wife, who is administratrix of all and singular the goods, chattels and credits, which were of *J. W.* deceased, at the time of his death, complain" &c., and concluded in the following terms, omitting the usual allegation of the grant of letters of administration to the plaintiff's wife, "and the said plaintiffs bring into court here the letters of administration of the goods, chattels, credits and effects of the said *J. W.* deceased, *duly granted* to the said *Elizabeth* by the consistory court of *St. Asaph*, which give sufficient evidence to the said court here of the grant of administration aforesaid to the said *Elizabeth*, &c."

Special demurrer, assigning for cause that it was not stated in the declaration on what day of the month or year the letters of administration were granted, nor by what judge or officer, nor the name of such judge or officer. Joinder.

J. Jervis supported the demurrer. The declaration is bad; first, because the plaintiff *Elizabeth* is not shown to be administratrix at the commencement of the action. Her title did not relate back to the death, but only accrued at the time of granting the administration, which date does not appear on the declaration. [Lord *Abinger* C. B. If, on craving oyer, the date of the administration appears on the face of it to be too late to have warranted the action at the time it was brought, he can demur.] Next, it does not appear that the proper authority, viz. the ordinary, granted the

administration. If the *court* mentioned had special power to grant administration, that should have been so stated. The right course is to state the date of the grant, and the name of the bishop, in the commencement of the declaration, and to conclude with profert of the letters of administration "of the said bishop, the date whereof is the day and year in that behalf above-mentioned."

R. V. Richards supported the declaration. The profert is only made that the defendants may have oyer of the letters of administration. Oyer being craved, they would be set out, and would themselves show whether they were granted by the proper party. If they were, the plaintiff would sustain his suit. That is the practice where there is profert of a deed in the declaration. Here, a primâ facie title appears in the plaintiff, for he avers that the administration was duly granted, and offers to produce the letters to the court, to see if they are such as he was entitled to proceed on.

J. Jervis in reply. Letters of administration granted by the proper authority, *i. e.* the ordinary, are part of that title which the plaintiff is to allege on the face of the declaration. The court cannot obviate that omission in this case by looking at the letters of administration.

Lord ABINGER C. B.—We are of opinion that this declaration is bad, upon the latter ground. If the letters of administration have not been issued by the ordinary, they are not granted by the proper authority. They may be valid if granted by some other mode, and may be valid when so granted, but in the absence of any express allegation to that effect, and taking the

the said lease, and by virtue of the said demise entered into and upon the demised premises with the appurtenances, and thereupon became and was and yet is possessed thereof for the term so to him thereof granted as aforesaid, until the 25th of *December* in the year 1833 aforesaid, and from thence until and at the said time when &c., held and enjoyed the said dwelling-house in which &c., and the said demised premises with the appurtenances, under and by virtue of the said demise. And the defendant further says, that on the said 25th day of *December* 1833, a large sum of money, to wit, the sum of 35*l.* of the rent aforesaid, for six months of the said term ending on the day and year last aforesaid, and then elapsed, became and was due and payable to the defendant, and at the time when &c., was in arrear and unpaid; wherefore the defendant, on the day when &c., entered into and upon the said dwelling-house in which &c., for the purpose and in order to seize, take, and distrain, and did then and there seize, take, and distrain the household furniture, &c., in the declaration mentioned, as for and in the name of a distress for the rent so due and in arrear to the defendant as aforesaid, and kept and detained &c., according to the form of the statute &c., and in so doing &c.

Replication, that before and at the time of making the said demise in the declaration mentioned, one *Adam Charlton* was, and from thence hitherto hath been and still is in the possession, use, occupation, and enjoyment of divers, to wit, eight acres of land, parcel of the said demised premises in the plea mentioned, as tenant thereof to the said defendant, whereby the plaintiff did not and could not enter into the possession thereof, or hold or enjoy the said last-mentioned land so being parcel of the said demised premises, or any part thereof; and although the plaintiff has always,

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letters to be in fact as here described, they are insufficient, according to the general law.

ALDERSON B.—A party who makes profert in his declaration, must be content to have it assumed that the document when produced will correspond in effect with the statement in the profert.

BOLLAND and GURNEY Bs. concurred; but

R. V. Richards had leave to amend the declaration.

NEALE *against* MACKENZIE.

N. accepts a lease from *M.* of 100 acres of land for one year, and enters on it. On his entry he finds eight acres in possession of *C.*, who is entitled under a prior lease from the same lessor, and keeps possession of the eight acres till half-a-year's rent is due from *N.* on the lease. *N.* has possession of the remaining 92 acres during all that time, but is excluded from that of the eight:—Held, that this was not such a case of tortious eviction by the landlord *M.*, as would entirely suspend the rent, but that it was apportioned only, so that the landlord could distrain for the apportioned rent of the 92 acres.

TRESPASS for breaking and entering the dwelling-house of the plaintiff, and seizing and distraining his household furniture, goods, and chattels therein. Pleas: first, as to the force and arms, and whatever else is against the peace, not guilty. Secondly, that before and at the time of the demise thereinafter mentioned, the defendant was seised of the dwelling-house in which &c., and of other premises thereinafter mentioned to be therewith demised, with their appurtenances in his demesne as of fee; and being so seised, afterwards and before the time when &c., to wit, on &c., demised the said dwelling-house and certain other premises with the appurtenances to the plaintiff for the term of one year, commencing from the 25th *June* 1833, at the clear rent of 70*l.* payable quarterly, that is to say &c. that afterwards &c., the plaintiff accepted

session and enjoyment of eight acres of land, part of the demised premises, by the act and default of the defendant, without stating any act or default of the defendant by which he has been kept out of the possession or enjoyment. Joinder in demurrer. The points relied on by the defendant were thus stated in the margin of the demurrer book:—That the replication is informal, because it neither traverses nor confesses and avoids the plea, and because the allegations that *Adam Charlton* was and still is tenant to the defendant, and that the plaintiff has been during the whole time kept out of possession of part of the demised premises by the act of the defendant, are uncertain and mere inferences of law, and amount to an argumentative traverse of the entry into the demised premises alleged in the plea.

Secondly, that the fact of the plaintiff not having had actual possession of part of the demised premises, if properly pleaded, is no answer to the right of the defendant to distrain for the rent which became due by virtue of the demise and entry under it, which are confessed on the pleadings.

Thirdly, that as defendant was at least entitled to distrain for the rent of that part of the demised premises of which the plaintiff had the actual possession, trespass cannot be maintained.

Fourthly, that the plaintiff having accepted the lease and entered into the demised premises under it, is estopped from denying his landlord's title to demise the premises comprised in the lease.

Cleasby supported the demurrer, in *Michaelmas* term 1834. The replication does not show how *Charlton* was tenant, whether for years or otherwise, nor does it contain any answer to the right to distrain set up by the plea. He was stopped by the court. *Parke* B.

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from the time of making the supposed demise in the said plea mentioned, hitherto been ready and willing and desirous of entering into the possession, use, occupation, and enjoyment of the said last-mentioned land, under and by virtue of the last-mentioned demise, of which the defendant had due notice, yet the plaintiff in fact says, that he the said plaintiff always, from the time of making the said last-mentioned demise, has been and still is kept out of the possession, use, occupation, and enjoyment of the said last-mentioned land, and every part thereof, by the act and default of the defendant, whereby the plaintiff has been wholly hindered and prevented from entering into and holding and enjoying the same, and from having and receiving all the profit and benefit which ought and would otherwise have arisen and accrued to the plaintiff therefrom. Wherefore the defendant, at the said time when &c., wrongfully and unlawfully entered into and upon the said dwelling-house in which &c., and seized and distrained &c. Verification.

Demurrer, showing for cause, that the replication does not traverse or put in issue any fact contained in the plea, and contains no matter of fact in avoidance of the demise and entry contained in the plea. That the averment in the replication, that the said *A.C.* was and still is the tenant of the defendant of part of the said premises, consists of mere inference and matter of law, wholly inconsistent with the facts admitted on the pleadings, and that the other averments in the replication consist of mere inference not warranted by the facts, and upon which no apt or material issue can be taken. That the replication is argumentative, and denies by implication a material averment contained in the plea, viz. the entry of the plaintiff into the demised premises under and by virtue of the demise, and alleges, that the plaintiff has been kept out of the pos-

rent would not be apportioned.] *Bompas* acceded to the suggestion of the court to amend.

The amended replication was as follows :—

That before and at the time of the making of the said demise in the plea mentioned, one *Adam Charlton* was, and from thence hitherto had been and still is in the possession and enjoyment of divers, to wit, eight acres of land, parcel of the said demised premises in the plea mentioned, under and by virtue of a certain demise theretofore made by the defendant to the said *A. C.*, and which last-mentioned demise was then, and from thence hitherto has been and still is, in full force and undetermined, whereby the plaintiff did not and could not enter into the possession of, or hold or enjoy the last-mentioned land, so being parcel of the demised premises in the plea mentioned, or any part thereof. And although the plaintiff has always, from the time of making the said demise in the plea mentioned, been ready and willing, and desirous of entering into the possession and occupation and enjoyment of the last-mentioned land, under and by virtue of the last-mentioned demise, whereof the defendant had due notice, yet from the time of making the last-mentioned demise hitherto, the plaintiff has been and still is kept out of the possession, use, occupation, and enjoyment of the last-mentioned land, and every part thereof, by the said *A. C.*, under and by virtue of the said demise to him thereof made by the defendant, whereby the plaintiff has been wholly hindered and prevented from entering into and holding and enjoying the same, and from having and receiving all the benefit, profit, and advantage which might and otherwise would have arisen and accrued to the plaintiff therefrom. Wherefore &c.

Rejoinder that the plaintiff, at the time of his said entry into and upon the said demised premises, under

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saying, a sort of eviction by title paramount is informally alleged; but the principal point is, whether the replication contains any answer to the right to enter and distrain alleged in the plea? The averment is, that the plaintiff entered into the demised premises, and became and was possessed thereof. That is a sufficient act, after the plaintiff's lawful entry, to amount to an eviction; but if it were not, would that be any answer to the defendant's right to distrain?

Bompas Serjt. supported the replication. It sufficiently appears that, by the defendant's own act, the plaintiff was evicted from part of the premises. After that the defendant could not distrain; for the rent was suspended and could not be apportioned as it might have been, had the eviction been by title paramount to that of the lessor. [*Parke* B. If the party evicting holds under the defendant by virtue of a former lease, he holds by title paramount to that of the plaintiff.] The tenant was here deprived of the beneficial enjoyment of part of the premises in consequence of an act of his landlord, which had already secured to a third person a title to the possession of part of the premises, one consequence of which is the eviction of the plaintiff from that part. Title paramount only means paramount to the landlord. [*Parke* B. It means paramount to the lease or other title conveyed. In this case it would be paramount to the landlord's title. Suppose this demise had been made, not by the defendant, but by a former owner of the land, and that the reversion descended to the defendant, the rent would without doubt have been apportioned. There the first lease must have been known to the landlord when he made the second; so that the entry of the first lessee would amount to an eviction by the defendant's wrongful act, and the

rent would not be apportioned.] *Bompas* acceded to the suggestion of the court to amend.

The amended replication was as follows :—

That before and at the time of the making of the said demise in the plea mentioned, one *Adam Charlton* was, and from thence hitherto had been and still is in the possession and enjoyment of divers, to wit, eight acres of land, parcel of the said demised premises in the plea mentioned, under and by virtue of a certain demise theretofore made by the defendant to the said *A. C.*, and which last-mentioned demise was then, and from thence hitherto has been and still is, in full force and undetermined, whereby the plaintiff did not and could not enter into the possession of, or hold or enjoy the last-mentioned land, so being parcel of the demised premises in the plea mentioned, or any part thereof. And although the plaintiff has always, from the time of making the said demise in the plea mentioned, been ready and willing, and desirous of entering into the possession and occupation and enjoyment of the last-mentioned land, under and by virtue of the last-mentioned demise, whereof the defendant had due notice, yet from the time of making the last-mentioned demise hitherto, the plaintiff has been and still is kept out of the possession, use, occupation, and enjoyment of the last-mentioned land, and every part thereof, by the said *A. C.*, under and by virtue of the said demise to him thereof made by the defendant, whereby the plaintiff has been wholly hindered and prevented from entering into and holding and enjoying the same, and from having and receiving all the benefit, profit, and advantage which might and otherwise would have arisen and accrued to the plaintiff therefrom. Wherefore &c.

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and by virtue of the said demise in the said plea mentioned, had notice of, and well knew that the said eight acres of land in the replication mentioned, parcel of the said demised premises, were then in the actual occupation of a certain person, to wit, the said *A. C.*, as tenant thereof to the defendant under and by virtue of a certain demise to him theretofore made for a certain term then unexpired.

Demurrer, assigning for cause, that by the plea of the defendant it is averred that the defendant demised the premises in the plea mentioned to the plaintiff in manner therein mentioned, and by the rejoinder it is admitted that the defendant did not and could not lawfully demise the said premises as in the plea mentioned; and also that by the plea it is averred, that by virtue of the demise in the plea mentioned, the plaintiff entered into and upon the demised premises, and thereupon became and was possessed thereof and enjoyed the same; and by the rejoinder it is admitted, that the plaintiff did not and could not become possessed thereof, and did not and could not hold and enjoy eight acres of land, being parcel of the said demised premises; and then the defendant avers notice thereof to the plaintiff, which is no answer to the replication of the plaintiff; and the defendant by his rejoinder does not fortify the matter by the plea pleaded in bar, but the rejoinder is inconsistent with the plea and a departure therefrom; and also that the rejoinder offers an immaterial issue, and is in other respects uncertain, &c.

The points intended to be argued for the plaintiff in support of this demurrer were these. That the rejoinder was no answer to the replication, and that the issue offered thereby was immaterial; and secondly, that the rejoinder was a departure from the plea, for the reasons stated in the demurrer. The points in

support of the replication were, first, that the facts pleaded amounted to an eviction by the tortious act of the defendant, and that the rent was thereby discharged; and secondly, that the demise in the plea mentioned was void as to the eight acres, parcel &c.; and that no separate and distinct rent being reserved for the remainder of the premises, the defendant had no right to distrain. The defendant's points were, that the rejoinder was not a departure from the plea, and that the replication was bad, because the facts alleged in it did not amount to an eviction by the defendant out of part of the demised premises. That as the defendant was at least entitled to distrain for the rent of that part of the demised premises of which the plaintiff had the actual possession, trespass is not maintainable; and that the plaintiff having accepted the lease, and entered with full knowledge of the facts, was estopped from denying the defendant's title.

This demurrer was supported in *Easter* term 1835 by

Bompas Serjt. for the plaintiff. The rejoinder is no answer to the replication, for it merely repeats and admits its statement, without averring that *before* the plaintiff accepted the lease or before he entered, he knew that eight acres were demised to *Charlton*. Then do these pleadings disclose the existence of any such contract of demise, as entitled the defendant to distrain at the time he did? They admit, that at the time of the demise to the plaintiff, eight acres of the land, which he then affected to let, were already on lease to *Charlton*. Then the subsequent lease was prevented from operating by the effect of the former, as appears from *Bacon*'s Abridgment, tit. *Leases for Years* (N), where we find, "If one make a lease to *A*. for ten years, and the same day makes a parol lease to *B*. for ten years of the said lands, this second lease is

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void and can never take effect, either as a future interesse termini or as a reversionary interest, though the first lessee should forfeit or otherwise determine his estate, or though the first lease were on condition, and the condition broken within the ten years; neither shall the lessor have the rent reserved upon such second lease, but such second lease is absolutely void as if none such had been made. The reason whereof is, because the first lease being made for ten years, the lessor, during that time, had nothing to do with the possession, or to contract with any other for it." [*Parke* B. The length of the term granted to *Charlton* does not appear; if it was exceeded by that of the lease to the plaintiff, he would have an interesse termini as to the excess, but not the reversion, that not being granted him by deed.] If the plaintiff has an interesse termini, the defendant's contract with him for a present demise of the whole premises is equally broken, it being for the present demise of the whole premises which were valuable or the reverse, as occupied together or not. The same principle applies in the entirety of contracts. Suppose a contract to deliver 100 bushels of flour, if only 50 are delivered and accepted, the vendor can only recover on an implied contract of quantum valebant (*a*), not on the original contract which he had not performed. If the defendant could maintain use and occupation against the plaintiff on his implied contract in respect of that part of the premises on which he entered, *Tomlinson* v. *Day* (*b*), such contract would not justify a distress by the defendant for the whole or any part of the rent; for the want of the passing of the eight acres under the demise prevented that reservation of a separate and

(*a*) See *Ozendale* v. *Wetherell*, 9 B. & Cr. 386; see id. 92.

(*b*) 2 Brod. & B. 681; 5 B. M. 558, *S. C.*

certain rent in respect of the portion actually occupied by the plaintiff, which is essential to the defendant's supporting a right to distrain; *Gardiner* v. *Williamson* (*a*).

Next, these pleadings disclose such an eviction of the plaintiff by the defendant, from part of the premises demised, as operates to suspend the whole rent. The record admits, that when the demise to the plaintiff was made, *Charlton* was possessed of eight acres of the demised premises by virtue of a demise thereof made to him by the defendant, which prevented the plaintiff from getting possession of the whole premises. The plaintiff is also admitted to have had notice of the lease to *Charlton*, at the time of his own entering on the rest. Then the question is, whether a landlord who, after demising a part of certain premises, afterwards and before that demise expires, leases the whole to a tenant, who at his entry on the rest has notice of such prior demise of part, can be said to evict the second tenant, who cannot get possession of the part before demised. The rent would have been apportioned had the eviction taken place by title paramount to the landlord's, *Stevenson* v. *Lambard* (*b*), *Doe* d. *Vaughan* v. *Meyler* (*c*). But as it occurred by his fault and by an act of his, tortious as against the plaintiff his second tenant, the whole rent is suspended, and the defendant had no right to distrain; *Co. Lit.* 148 b., *Walker's* case (*d*). The principle is not confined to actions of debt or covenant for rent, but extends to avowries in replevin, 2 *Inst.* 503. [*Parke* B. I always thought that every remedy for recovering rent remained where it was necessary to apportion it.] This distinction, between eviction by title paramount, and by the land-

(*a*) 2 B. & Ald. 336.
(*b*) 2 East, 575.
(*c*) 2 M. & S. 276.
(*d*) 3 Rep. 22 b.

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lord, was adverted to by Mr. Baron *Parke* in *Reeve* v. *Bird* (*a*), and the effect of an eviction by the landlord is clear, if the facts bear it out, as it is submitted they do here. *Tomlinson* v. *Day* (*b*) shows that no difference arises from the plaintiff's never having been in possession of the eight acres; for in that case *A.* demised a farm, glebe land, and a right of sporting to *B.*, who entered the farm, but could not get possession of the rest. *A.* sued *B.* for the whole rent in an action of use and occupation, and it was held a sufficient answer to that action, that *B.* paid into court the value of the farm only; *Dallas* C. J. saying, that the facts "operated as an eviction of part of the subject-matter of the demise," and *Burrough* J. that "they were either a misrepresentation, or amounted at least to an eviction as to part." *Bompas* also cited *Dyer* 56 a., *Doe* v. *Meyler* (*c*), *Rees* v. *Phillip* (*d*).

Cleasby for the defendant supported the plea and rejoinder. The question is, whether after the facts stated in the replication, and admitted by the rejoinder, the rent was suspended, or merely so apportioned that a sufficient demise remained to support the distress. If the rent was merely apportioned, the defendant must have judgment, for his avowing or distraining for too much would not prevent him from recovering the just sum due, *2 Inst.* 503, 504. The plea is not directed to the eight acres of which the plaintiff did not get possession. This case has no analogy to that put of the delivery of part of goods contracted for, instead of the whole, for a rent reserved issues out of the whole and every part of the land let, and every part is subject to the whole rent; *Hargrave* v. *Shewin* (*e*). If the case

(*a*) *Ante*, Vol. IV. 614, 616; 1 Cr. M. & R. 36, *S. C.*
(*b*) 2 Brod. & B. 681; 5 B. M. 558, *S. C.* (*c*) 2 M. & S. 276.
(*d*) Wightw. 69. (*e*) 6 B. & Cr. 34.

put had any application, the landlord might equally be contended to have not performed his contract in a case where the eviction was by title paramount to his; which would prevent rent reserved under a lease from being ever apportioned. Besides, the plaintiff, at his entry on the remainder of the premises not let to *Charlton*, is admitted to have had notice of the interest claimed by him in eight acres. Then the plaintiff must be taken to have accepted the demise, subject to *Charlton*'s prior interest, and by entering on the rest to have waived all objection on that ground, and become liable to all the consequences of the demise to himself.

But the plea must prevail, because there has not been such an eviction by the defendant as to occasion a suspension of the whole rent; and the plaintiff cannot maintain trespass unless the defendant could not distrain for any part of the rent; *Lyne* v. *Moody* (*a*). Now Chief Baron *Gilbert* says, in p. 146. of his *Treatise on Rents*, that if a disseisor make a lease for years, rendering rent, and afterwards the disseisee enters and ousts the lessee, yet the lessee shall be accountable for the rent incurred before the ouster, because he cannot be taken for a trespasser, since he came into the land under the sanction of a legal contract, though the disseisor having but a defeasible title, could not perform the contract; however, till it was destroyed, and while the lessee had the peaceable enjoyment of the land, that obligation to pay the rent, which was founded on the enjoyment, must continue, and consequently the lessee be obliged to pay the rent till the entry of the disseisee. For the same reason, if part only of the land which was let be evicted from the tenant, such eviction is a discharge of the rent in pro-

(*a*) Fitzgibbon's Rep. 85.

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portion to the value of the land evicted (*a*). That authority is decisive against the plaintiff on both points, for it establishes his liability as tenant in proportion to his enjoyment of land, though the landlord do not perform his whole contract, and being a disseisor knew that he could not; and it also shows that the rent is not suspended in toto, but only as to the eight acres of land from which the tenant is evicted, owing to a defect in the lessor's title, of which he was aware. [Lord *Abinger* C. B. Eviction implies previous possession by the party evicted. Now as the plaintiff was never in possession of the eight acres, could he on these pleadings have ever had more than the reversion in them (*b*), as it does not appear that the demise was by deed? that brings this case within that of *Gardiner* v. *Williamson* (*c*). *Parke* B. How can a tenant be said to be evicted from a part of which he never had possession? Had he received possession of all for a day only, and been afterwards evicted and kept out of possession, it would have been different (*d*). But if this was an eviction at all, was it not by *Charlton?*] The defendant was not guilty of that tortious entry and expulsion which constitutes an eviction (*e*). In *Gardiner* v. *Williamson* there could not be an apportionment of rent, so as to authorize a distress, for the homestead and tithes were let together by agreement not under seal, so that the tithes could not pass, nor was a separate rent reserved for the homestead, which did. [*Parke* B. There the rent issued from the land in point of remedy, out of both land and tithes in point of render. Nothing here passed by the demise as to the eight acres. Lord *Abinger* C. B. You have not

(*a*) Moore's Rep. 50; Dyer, 56.

(*b*) See generally as to eviction, 1 Saund. 204 note.

(*c*) 2 Bar. & Ald. 336. (*d*) See *Doe* v. *Meyler*, 2 M. & S. 276.

(*e*) See cases collected in Gilbert on Rents, 178.

answered the replication in your rejoinder.] The plea alleged a demise by the defendant to the plaintiff, an acceptance of that demise by the plaintiff, with his entry and possession under it. The replication, by averring the prior title of *Charlton*, gives no answer to these facts, for the demurrer admits that the plaintiff entered with knowledge of the prior demise to *Charlton*. He should have traversed his entry with that knowledge, if he intended to enable himself to say that he was not bound by the lease. *Tomlinson* v. *Day* is an authority against the plaintiff, for it proceeded on the ground that the rent was apportioned. Then as a distress for an apportioned rent is legal, *Stevenson* v. *Lambard*, and *Coke*'s *2 Inst.* 503, this distress would be good for that part of the rent to which the defendant was entitled as apportionable. Then this form of action is not the remedy for a distress for more rent than is due. [Lord *Abinger* C. B. *Tomlinson* v. *Day* was an action of use and occupation, in which it was not necessary to decide on the effect of an eviction.]

Bompas in reply. The defendant contracted to put the plaintiff in possession of the whole, but did not do so. That objection remains and avoids the demise absolutely. [*Parke* B. The demise is not necessarily void, for the second demise was capable of being rendered valid by the prior one being got in before the 25th *July*, when the plaintiff's demise began. No reversion could pass without deed, so that only an interesse termini could pass. But it is not like *Gardiner* v. *Williamson*, where the tithes could not pass so as to let the agreement operate according to the intention of the parties. Lord *Abinger* C. B. The difficulty is, to find on these pleadings what is the real situation of the plaintiff and defendant. Suppose a man is bound to let a farm, and that a party knowing

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that several cottages and gardens, which are understood to be part of it, are subject to existing leases for years, takes a lease of the whole for 21 years, and enters on the farm intending to receive the rent of the cottages, would it lie in his mouth to say, that he had been evicted from them, because at his entry he could not take possession of them? *Parke* B. Such a lease would operate as a present demise of the land, and if not by deed, as a grant of the interesse termini in the cottages. We cannot tell here, whether there is an interesse termini or not, for the defendant has not shown for what term the eight acres were demised. The plaintiff's knowledge of the prior demise is not laid to have been before his entry. The difference between this case and that put, of delivering less goods than contracted for, is this: such a contract is entire without any stipulation that if less goods be delivered and accepted, a less sum shall be paid and received; whereas, in cases of rent, the law introduces the qualification, that if a tenant is evicted by title paramount, his rent shall be apportioned. Suppose a stranger to have a title paramount to that of the lessor, who knows that fact, and yet demises to a lessee who is evicted of part under such title paramount, the rent would primâ facie be apportioned only, not suspended; for the lessor might think his title a lawful one, and being wrong might become a disseisor (*a*), unless such a transaction should suspend the rent. I do not at present know how to distinguish that case from the present; the wrong act in both being the attempt to demise what there was no right to demise. My impression has always been, that to make out an eviction there must be some tortious act of lessor subsequent to the demise and entry of lessee. The occasioning the plaintiff to be dis-

(*a*) Moor, 50.

possessed by *Charlton* under a prior title, conferred on him by the defendant, is equivalent to dispossessing him of it himself.]

Cur. adv. vult.

The judgment of the court was afterwards delivered in *Easter* term 1835, by

PARKE B.—The plaintiff in this case complains of a trespass for entering his dwelling-house and taking his goods.

The defendant pleads, in substance, that he was seised in fee, and before the time of the alleged trespass, demised the dwelling-house, and other premises, to the plaintiff, for one year from the 25th *June*, at the rent of 70*l.*, payable quarterly: that the plaintiff accepted the lease and entered under it: and that half-a-year's rent was due at *Christmas*, for which the defendant took the goods as a distress.

The plaintiff replies, and not denying that he accepted the lease, and that he entered under it, says that at the time of the demise, one *Adam Charlton* was in possession of a part of the demised property under a prior lease from the defendant, which continued and was in force, until after the time when the half year's rent was due; and that during the whole of that time he was kept out of the possession of that part by *Adam Charlton.*

To this there is a rejoinder, which states, that plaintiff had notice of *Adam Charlton*'s title, at the time of his own entry (but not before), and consequently not at the time of the demise, or of his acceptance of the lease. To which rejoinder the plaintiff has demurred.

It is not necessary to consider, whether this rejoinder is a departure or not; indeed it does not add any new fact to those which are stated in, or necessarily inferred from the replication; for that shows, by implica-

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tion, that after he entered, the plaintiff knew that *Adam Charlton* was in possession of part.

The question is, whether the replication is a good answer to the plea, which plea is clearly a good bar to the action; and that depends upon a point of law of some nicety and difficulty.

The case is this. *A.* lessee under a lease for one year of a certain quantity, say 100 acres, accepts the lease, and enters upon the faith of his being entitled to the whole. He finds eight acres in the possession of a person entitled under a prior lease from the lessor, which person keeps possession of that part until half-a-year's rent accrues due: and excludes the lessee from the enjoyment of it, for all that time. The lessee continues in possession of the remainder: and the question is, whether he is liable to be distrained upon for the whole rent, or for any part, and in the latter case, whether a plea or avowry justifying a distress for the whole rent can be supported.

The first point to be decided, is one which was made on the argument, viz. whether the supposed lessee was in under the lease at all, or under a new contract at an unascertained rent, upon which he would be liable on a quantum meruit for use and occupation, but not to a distress.

We think he was in under the lease, and for these reasons. If a lessor who makes a lease not under seal, purporting to devise 100 acres in possession, has already demised eight to another person, his lease cannot operate according to the intention of the parties; and the lessee, who has agreed for a lease of the whole, cannot be bound to accept a demise which does not convey the whole. He may decline to accept it, and to enter; and if he does so, he cannot be bound by the stipulations in it. But notwithstanding this defect, the lease is capable of a legal operation; it enures as a present

demise giving a right to immediate possession of the residue, 92 acres for one year, and passes (not the reversion, because that lies in grant, and the lease in question is not under seal) but an interesse termini in the remaining eight for one year also, (*Sheppard's Touchstone* by *Preston*, 276) from the date of the lease, so as to give *a right* to a term for all that period, and to the possession on the determination of the prior lease, by efflux of time, or by any other lawful mode: for as the existence of the prior demise of part is the only impediment which prevents the present operation of the lease as to that part, it should seem that whenever and in whatever way that impediment is removed, the new lease must take effect in possession, (see *Bac. Abr.* tit. *Leases*, N. 2. *Preston on Conveyancing* 150.) If then the lease being capable of such legal operation, the lessee enters with the knowledge of the defect of title, or, which is the same thing, having entered afterwards with the like knowledge, and consequently with knowledge of the limited operation of the lease, continues in possession, he must hold as lessee under the lease, so far as it is capable of a legal operation.

What then is the situation of such a lessee whilst he is kept out of the possession of the remaining part?

He cannot be considered as a lessee at an apportioned rent *for the whole term*, according to the value of the part enjoyed; for non constat, but that the former demise of a part may not end, during the term, and then he would be lessee in possession of the whole at the whole rent: or non constat, that though the former demise may not be determined, yet that the prior lessee may quit possession, and the present lessee enjoy the whole, in both which cases he would be liable for the whole rent reserved, which should subsequently become due, and that by virtue of the lease. In this respect the case differs from a release of part of the

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rent, or a purchase by the lessor of the lessee's interest in part of the demised land; for in such cases the rent would be apportioned for *the whole term*, and the lessee would hold at the diminished rent for the whole term.

If then the rent is not to be apportioned during the whole period of the demise, the lessee must either continue liable for the whole rent, with a remedy over against his lessor on the contract express or implied, in his lease, for quiet enjoyment; or he must be liable to no part of the rent, or to an apportioned part during the time that he is kept out of possession of part, in the same way that he would be, if after he had entered he had been evicted of part by a title paramount.

If he is liable to the whole rent, the plea in bar would not be answered; because the demise therein mentioned would be correctly stated and the tenant's liability to the full amount would continue. But we conceive that he cannot be liable to the whole rent whilst he is kept out of part of the demised property, and that this case is one of eviction, or is to be governed by the same principle.

The principle upon which eviction is a defence is this, that rent issues out of the land, and is to be paid out of the profits: and if the land be taken away, the rent is discharged, *Slade* v. *Thompson* (*a*). If the lessee had entered into the whole, and been evicted the instant after by the tortious act of the lessor, or by an elder title, from *part*, and kept out till the rent was due; the rent would either have been entirely suspended, or proportionably diminished; and we cannot see that there is any difference between such a case, and one in which the lessee never did get possession of the whole, but was kept out of part, from the very commencement of the lease, until the rent day. In

(*a*) 1 Roll. Rep. 198; Co. Litt. 292 b.

each case the lessee has been deprived of the profits, and therefore in each he should be exonerated, either altogether, or in part, from the payment of the rent.

If this be correct, the only question is, whether the rent is entirely suspended or apportioned. The whole rent is suspended by eviction, where the lessee is guilty of a tortious act, as if he enter and disseise, or put out the lessee (*Co. Lit.* 148 b.), and the reason given by Chief Baron *Gilbert*, in *Bac. Abr.* tit. *Rents* (M 1.) p. 36. is, "that no man might be encouraged to hinder or disturb his tenant in possession."

But if there be lawful eviction from part by an elder title, it is clear that the rent is apportioned only, and not suspended.

The question is, to which of these two classes of eviction the present case is analogous. If *Adam Charlton*, the tenant of the part, had claimed under a conveyance granted by the lessor, subsequently to the lease, his act would have been unlawful; and the same as an unlawful act by the lessor himself. In that case the rent would have been suspended in toto.

But *Adam Charlton* claims under a prior demise, and therefore by a title paramount to the lease, though not paramount to that of the lessor, and his act in retaining possession is lawful, and there is no tortious act by the lessor himself; unless the fact of demising with knowledge of the title of another be so.

But it is clear that this would not be a *tortious act*, so as to suspend the whole rent, if the person having title enter: for if a disseisor demise land, and the disseisee afterwards enter into part, it is a case of apportionment only, though the disseisor must have known of his own defect of title, *Moore*, 50.

It appears to us, that this is a case of apportionment only, and in the nature of a discharge of part of the rent alleged to be in arrear; and therefore no answer

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to the plea, if there was a power of distress for the remainder; and that there is a power to distrain for an apportioned rent, is clear from the passage in *2 Coke*, 503. cited on the argument.

The case of *Gardiner* v. *Williamson* (*a*) was adduced to prove that there could be no distress for the rent of a part of the demised premises, where the precise amount of rent was not fixed by the parties.

But that case is distinguishable from the present: there the contract between the parties was, to pay one entire sum of 200*l.* for the rent of the homestead which was demised in point of law, and for a compensation for the tithes for one year which were not; for as to the latter, the demise was absolutely void on the face of the instrument, and would never have any operation *as a lease*. The entire sum never could be due, under any circumstances, as rent: and therefore there could be no apportionment of it, upon the principle of eviction, that is a discharge of part of the rent, by the loss of part of the consideration for the payment of it, and during such loss. It was therefore a case of a demise of the land at an uncertain sum, for which there could be no distress. But in this case, there is a demise at a sum certain, which sum is subsequently abated during the time that the lessee is prevented from enjoying.

We, therefore, think that the replication is no answer to the plea, and the defendant ought to have judgment.

Judgment for the defendant (*b*).

(*a*) 2 B. & Ald. 336.

(*b*) Reversed on error, *Easter* term, 1836. See Tyr. & Gr. Rep. in the Press.

EDGE *against* SHAW and Wife.

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ASSUMPSIT for goods sold and delivered. Particulars of demand stated a claim of 16*l.* 10*s.* 8*d.* for goods supplied to the wife before marriage. Plea, non assumpsit. The trial took place before the under-sheriff of *Warwickshire* under a writ of trial. Verdict for defendants. A rule nisi for a new trial was obtained by *Humfrey*, first, on the ground that evidence of payment had been left to the jury; and secondly, that the sheriff's notes showed the writ of summons to be indorsed for 59*l.* 8*s.* 10*d.*, which destroyed his jurisdiction.

The particulars of demand claimed 16*l.* 10*s.* 8*d.* for goods sold and delivered; and an order was granted for trial before the sheriff, under 3 & 4 *W.* 4. c. 42. s. 17. The writ of summons, when produced, was indorsed for a sum above 20*l.* The defendant had a verdict on evidence not covered by the plea. The court set aside the verdict, and amended the writ of summons by altering the indorsement to 16*l.* 10*s.* 8*d.*, and allowing the defendant to plead de novo.

Archbold showed cause. First, the evidence did not amount to evidence of payment. Next, the plaintiff obtained the writ of trial, so that, after taking the chance of a verdict, he ought not now to be suffered to say that it was not a fit cause to be so tried. The plaintiff must have put in evidence the writ of summons, the defendant could not.

Humfrey supported the rule.

Per Curiam (BOLLAND, ALDERSON, and GURNEY Bs.) The rule for a new trial must be absolute on the first point, giving the plaintiff leave to alter the writ of summons by reducing the indorsement to 16*l.* 10*s.* 8*d.*, without applying to a judge, and the defendants also being at liberty to plead payment. *Alderson* B. added, Costs of the trial and of the application to the judge for an order for the trial must be paid by the plaintiff. The sheriff had nothing to do with the amount indorsed on the writ. He tried the case in pursuance of the judge's order. The plaintiff should have applied to amend the writ before trial.

A sheriff who receives an order to try a cause, must try it, though the writ of summons be indorsed for a sum above 20*l.*

Rule absolute accordingly.

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WILLIAMS *against* WARING.

The ca. sa. in an action on a bond conditioned in a penalty of 312*l.*, was indorsed to satisfy 188*l.* 9*s.*, "with further interest from 31st *January* then instant, upon 156*l.* until paid:" Held sufficiently certain.

Delivery of a warrant under a ca. sa., to a deputy sheriff at his office in *London*, within the next term after that in which judgment was signed, is a charging in execution in due time, being the same as a delivery to the sheriff. (3 & 4 *W.* 4. c. 42. s. 20.)

DEBT on a money bond, with a penalty of 312*l.* Judgment was signed in the vacation after *Michaelmas* term, and a ca. sa. issued into *Denbighshire*, reciting the judgment obtained for 312*l.*, and indorsed to satisfy the sum of 188*l.* 9*s.* "*with further interest* from the 31st *January* then instant, upon 156*l.* *until paid.*"

J. Jervis moved to set aside the ca. sa., and to discharge the defendant out of custody, on the ground that the indorsement was so uncertain, that the sheriff might refuse to discharge the defendant till the interest as well as the principal was paid. Now the interest may in time exceed the penalty. A rule having been granted,

Miller showed cause. The sum indorsed does not exceed the amount covered by the judgment, and if it were excessive, the defendant could only set it aside for the excess. *J. Jervis* supported the rule.

Lord ABINGER C. B.—The defendant can easily pay or tender the whole sum which he considers to be due; it will then be time to apply to the court for his discharge if that sum is refused. The utmost that could be done would be to set aside the execution as to the excess.

J. Jervis. The defendant was not charged in execution within two terms inclusive of that in which judgment is signed, for the judgment has reference to *Michaelmas* term for the purpose of a supersedeas, and the warrant, though delivered on the last day of *Hilary* term, was only so delivered to the deputy sheriff in *London* under 3 & 4 *W.* 4. c. 42. s. 20.

Lord ABINGER C. B.—That is the same as a delivery to the sheriff himself.

Rule discharged.

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IN THE EXCHEQUER CHAMBER. (a)

(In Error from the Exchequer of Pleas.)

EASTON *against* PRATCHETT.

To a declaration on a bill by indorsee against his immediate indorser, who was the drawer, the defendant pleaded that he indorsed the bill to the plaintiff without having or receiving any value or consideration whatsoever for or in respect of his said indorsement, and that he the said defendant had not at any time had or received any value or consideration whatsoever for or in respect of such indorsement:—Held, after verdict for defendant, that the plea was good.

ASSUMPSIT against the drawer of a bill of exchange by his immediate indorsee. The bill was dated 15th *May* 1832, being for 100*l*.. payable to the drawer's own order, at four months after date, for value received in spokes, and accepted by one *Maddock*. Count on an account stated.

A writ of error was brought by the plaintiff, against whom judgment had been given in *Hilary* term last.

Cowling for the plaintiff. The plea merely alleges that there was no consideration for the indorsement of the bill by the defendant, and admitted that the defendant promised as stated in the declaration.

Plea to the first count, that the defendant indorsed the bill to the plaintiff, without having or receiving any value or consideration whatsoever for or in respect of the said indorsement thereof, and that the defendant has not at any time had or received any value or consideration whatsoever for or in respect of such indorsement. Verification.

Replication, that the defendant heretofore, and at the time of indorsing the said bill to the plaintiff, had and received from the plaintiff a good and sufficient consideration for and in respect of the said indorsement of the said bill to him the said plaintiff as aforesaid; concluding to the country. Issue thereon.

The defendant had a verdict on this issue, the jury

(a) The judges of the court of error were Lord *Denman* C. J., *Littledale* and *Patteson* Js. of K. B.; *Gaselee*, *Bosanquet*, and *Vaughan*, Js. of C. P.

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finding that the bill was an accommodation bill between the plaintiff and defendant, indorsed by the defendant without good consideration. A rule to enter judgment for the plaintiff, non obstante veredicto, was obtained on the ground that the plea did not exclude the case of consideration having been received for the bill by another person, and was therefore no answer to the declaration. This rule having been discharged in the court below (*a*), the plaintiff brought a writ of error, which was now argued by

Cowling for the plaintiff. The defendant does not allege that there was no consideration for the promise laid in the declaration, which, though demurrable since the new rules of pleading, would have been cured by the verdict. But he admits his promise to have been that stated in the declaration, and merely alleges that there was no consideration for the indorsement. Then if consideration is shown for the defendant's promise to pay, he is liable, though the plaintiff gave him no consideration for the indorsement. It was unnecessary for the plaintiff to prove such consideration; *Sowerby* v. *Butcher* (*b*). But as the plea does not deny consideration for the acceptance, the defendant's remedy over, as drawer against the acceptor, is a sufficient consideration for his promise. [*Patteson* J. That argument is immaterial, as the acceptances need not have been averred in the declaration, or proved if so averred; *Tanner* v. *Bean* (*c*).] It is a fact in the case, however; and the test of the consideration for this indorsement is, whether, if the defendant had given the plaintiff money instead of the bill, he could have recovered it back from him on the insolvency of the acceptor *Maddock*. See per *Parke* B. in *Stephens* v. *Wilkin-*

(*a*) See *ante*, Vol. IV. 472. (*b*) *Ante*, Vol. IV. 320.
(*c*) 4 B. & Cr. 312; *Parkes* v. *Edge*, *ante*, Vol. III. 364.

son (*a*). Had the plaintiff sued the acceptor and recovered on this bill, the acceptor might have set off the sum so recovered against any demand the defendant, the drawer, had against him. Then if the defendant is ex confesso liable circuitously, why should he not be suable directly? An indorsement by the defendant for the accommodation of the plaintiff or of the acceptor, might have been a different case. The defendant is personally bound by having indorsed this bill absolutely, whereas if he merely intended to transfer to the plaintiff his own right of action against the acceptor to the plaintiff, it should have been indorsed *sans recours*. Admitting that there must be some consideration, and that a gift does not amount to it, the cases to prove that are between payee and acceptor (*b*), and therefore do not apply, for there has been no third person against whom the defendant might recover over. The objection to the plea on the words "having and receiving," is admitted to be cured by the verdict.

Crompton for the defendant. The promise in this declaration is a mere conclusion of law, primâ facie warranted by the facts alleged. It was therefore the same to plead that there was no consideration for making the indorsement or for making the promise. The plea rebuts the promise laid, because the want of consideration prevents a promise from being implied by law, as an actual promise would have been void for want of consideration. The question in *Sowerby* v. *Butcher* was not, whether any consideration was necessary, but whether there was a sufficient consideration. The judgment of *Parke* J. in *Stephens* v. *Wilkinson*

(*a*) 2 B. & Adol. 326.

(*b*) But see *ante*, Vol. IV. 472 *c*; Chitty on Bills, 83; and see *Pyke* v. *Street*, M. & M. 226; *Foster* v. *Jolly*, *Stoughton* v. *Kilmorey*, and *Mills* v. *Oddy*, *ante*, this Vol.

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turns on a well-known principle, that partial failure of consideration is no defence. Both cases rather show that a total want of consideration would in this case be a defence. The promise is said to arise on the indorsement, but there was no consideration for that indorsement. As the indorsee's liability was not affected by the acceptance, the remedy over is immaterial. See C. J. *Abbott*'s judgment in *Tanner* v. *Bean*. How can the drawer's right to sue the acceptor on his original liability be a consideration for the drawer's subsequent promise to pay the party to whom he afterwards indorses the bill? The drawer had the right to sue the acceptor before. [*Patteson* J. The defendant had the bill and the right to sue the acceptor in the first instance. How does that consideration come from the plaintiff?] Every case shows that no negotiable bill or note is binding between any immediate parties to it without consideration, and that rule is not confined to cases between drawer and acceptor. Even if the plea would have formerly amounted to the general issue (*a*), or if it now amounts to it, the defendant must have judgment.

Lord DENMAN C. J.—This judgment must be affirmed; for the finding of the jury, that there was no consideration for the defendant's indorsement, puts an end to the case. Supposing that there had been an express promise to pay the bill, it would be a mere nudum pactum, and not binding without a consideration. It is a mere fallacy to say that the liability of the acceptor, which previously existed, could be a consideration for a promise from the indorser to pay the amount to his indorsee. There is no doubt that the plea would have been bad on special demurrer, but

(*a*) See Vol. IV. 472, *l* and *m*.

after the verdict, it must be taken that there is no consideration binding in law.

Per Curiam.

Judgment affirmed.

IN THE EXCHEQUER CHAMBER (*a*).

(In Error from the Exchequer of Pleas.)

LOWE *against* The ATTORNEY-GENERAL.

In an information on 3 & 4 *Will.* 4. c. 53. s. 44., the smuggling act, for illegally removing goods from any warehouse or place of security in which they shall have been deposited, a *king*'s warehouse may be described as a "warehouse."

THIS information against the plaintiff in error was framed on 3 & 4 *Will.* 4. c. 53. s. 44., and charged the defendant with having "assisted and been concerned in the illegal removal of certain goods from a certain warehouse in the united kingdom wherein the same had been deposited, that is to say, in *London*, commonly called *The King's Warehouse*, at the *Custom-house*." Judgment having been given in the Exchequer for the *Attorney-General*, a writ of error was brought and argued before the same judges as the last case by

J. Jervis for the plaintiff in error. The section enacts, "that every person who shall knowingly harbour &c. any goods which shall have been illegally removed without payment of the duties from any warehouse or place of security in which they have been deposited, or who shall assist or be in anywise concerned in the illegal removal of any goods from any warehouse or place of security in which they shall have been deposited as aforesaid, shall forfeit either the treble value thereof or 100*l.*" Two places are contemplated from which goods may be removed, viz. a warehouse or a

(*a*) Before the same Judges as the last case.

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place of security, and the question is, whether the words "king's warehouse" mean a "warehouse" within the section cited. The legislature has defined merchant's warehouses and king's warehouses as distinct, for by 3 & 4 *Will.* 4. c. 52. s. 119., a warehouse is described to mean "any place, whether house, shed, yard, timber-pond, or other place, in which goods entered to be warehoused for importation may be lodged, kept, and secured, without payment of duty, or although prohibited to be used in the united kingdom; whereas a "king's warehouse" is defined to mean "any place provided by the crown for lodging goods therein for security of the customs." The merchants have always acted on this distinction. The words "a place of security" show that an improper removal from a king's warehouse is not left unprovided for by the legislature, had the information adopted those words. But it is for the crown to show that a king's warehouse is the same as a warehouse. [*Patteson* J. The 'king's warehouse' at the Custom-house, to which the goods were taken under 3 & 4 *Will.* 4. c. 52. s. 17. is entirely in the power of the crown, whereas goods in a bonded warehouse are in the joint custody of the crown and the merchant. But the smuggling act, on which this information is founded, describes a species of warehouse which is neither one or other of the sorts of warehouses above described, viz. a 'Custom-house' warehouse. *Bosanquet* J. Suppose it was a king's warehouse, properly so called, is it necessary to lay it as being such?] If the description could be rejected, no removal at all would be alleged.

Kaye for the defendant in error. This point was decided on an information *in rem* in *Attorney-General* v. *Vondiere* (*a*). But it does not arise here, for the

(*a*) 4 Tyr. 206.

information only alleges the warehouse as "*commonly called* the king's warehouse," and not that it is a king's warehouse.

Lord DENMAN C. J.—There is no ground for doubt in this case, either on the principle or wording of the section before us.

Judgment affirmed.

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AN

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But where, in an action for false imprisonment, the defendant pleads the return of *non est inventus* to a writ of *capias*, and justifies arresting the plaintiff on an *exigi facias*, and after replication that no affidavit of debt was duly made and filed, the defendant in his rejoinder avers that there was, and sets forth an affidavit open to have been set aside for irregularity in the above respect:—Held, on special demurrer to the rejoinder, that the defendant was entitled to judgment, because trespass is only maintainable where the process is an absolute nullity, not where it is merely erroneous in form, and has not been set aside on that account by authority of the court. *Ib.*

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The declaration stated that the defendant guaranteed the payment of goods furnished by plaintiff to *H.* at the defendant's request. Plea, that before breach of that undertaking, it was agreed between plaintiff and defendant, that plaintiff should supply goods to *H.*, and that they should be paid for at the end of three months by a joint bill at four months to be accepted by the defendant; which agreement of defendant, plaintiff, before breach of the former undertaking declared on, accepted in full discharge of such former agreement, and released the defend-

ant from performing it:—Held, on demurrer, that the second agreement did not require to be in writing, pursuant to 29 *Car.* 2. c. 3. being a provision by which the defendant became absolutely bound as an original debtor; and not being an accord and satisfaction, but a substituted contract, afforded a good defence to the action without alleging performance. *Taylor* v. *Hilary*, H. 1835. 373

The following agreement was held to show sufficient consideration moving from the plaintiff by way of detriment to him in giving up the security of the debtor *C.* for 150*l.* at the defendant's request.

"I undertake on behalf of Mr. *P.* (the plaintiff) in consideration of Mr. *D.* (the defendant) having this day given me an undertaking to procure Mr. *W.*'s check or note in favour of Mr. *P.* for 150*l.* on account of a debt due from Mr. *C.* to Mr. *P.*, that Mr. *C.* shall *have credit* for that sum in his accounts with Mr. *P.*, and that Mr. *W.* shall *stand in the place* of Mr. *P.* to that amount; and I further undertake that Mr. *P.* shall not personally dispute Mr. *W.*'s right to deduct that sum from the accounts owing by the colliers of the *B. P.* colliery to Mr. *C.*" The declaration alleged *D.*, (the defendant's) promise to be in consideration of that of *P.* the plaintiff, by way of mutual promise: Held good, and that it was sufficient to aver that plaintiff was ready and willing to perform his part. *Peate* v. *Dicken*, M. 1834. 116

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ARBITRATION AND AWARD.

A cause in the stage after appearance and before plea was referred to arbitrators, with all matters in difference between the parties, the costs of the cause as well as of the reference and award, to abide the event of the award. It appeared before the arbitrators that the defendant had a larger cross demand against the plaintiff than he, plaintiff, could establish in the action. The award directed that the action should cease and be no further prosecuted; that on the balance of accounts 661*l.* was due from the plaintiff to the defendant, and that the plaintiff should pay that sum to the defendant. It was argued that as this award did not state that the plaintiff had no cause of action against the defendant, no event was found which the costs might follow; so that the award was not final. The court held that it sufficiently showed the decision to be in favour of the defendant, and accordingly refused to set it aside. *Eardley* v. *Steer*, T. 1835. 1071

The arbitrator could not order a verdict to be entered. Per *Parke* B. *Ib.*

A defendant applied to a judge at chambers to order a third party to appear and maintain or relinquish his claim to the subject-matter in suit, and in the meantime to stay proceedings, under 1 & 2 W. 4, c. 58. s. 1. Instead of directing an issue, the judge, by consent of the parties in the cause, and a third party, and administratrix, made an order referring the cause to an arbitrator. The third party afterwards applied to the court to vary the order, by introducing a fresh direction to the arbitrator, in consequence of some admission of the defendant since the meeting at chambers, which went to fix his liability to a claim by the third party, and to establish his defence to the action by the plaintiffs. The court refused to grant even a rule nisi without the defendant's consent. *Drake and another* v. *Brown*, T. 1835. 1067

Where an arbitrator is a member of the profession of the law, the court will not on that ground examine into a supposed defect in his decision on a point of law, unless apparent on the face of the record; and there is no distinction in this respect between legal and other arbitrators. *Jupp and others* v. *Grayson*. *Grayson* v. *Jupp and others*, M. 1834. 150

Where all the costs, as well of an action as of the reference and award, are to abide the event, they need not be mentioned in the award. *Ib.*

An arbitrator decided in favour of plaintiff, and then stated facts on his award, ordering that if the court should differ from him in opinion on considering those facts, a nonsuit should be entered. The court refused to set aside the award, on the ground that he had come to a wrong conclusion on the evidence, for though they did not concur in it, it did not appear that there was *no* evidence in sup-

port of it. *Barrett* v. *Wilson*, M. 1834. 218

A party having a claim to payment of a sum of money under an award, must elect whether to proceed on it by action, or to move for an attachment. An attachment had issued for non-payment of a sum which by an award the defendant was directed to pay; but though able, refused to do so, saying, he had rather go to gaol, which he accordingly did. The plaintiff then sued him on the award. The court discharged the defendant, on the terms of giving a bond to the plaintiff, with sureties to the master's satisfaction, conditioned as in the case of a recognizance of bail. *Lonsdale, Earl of*, v. *Whinnay*, M. 1834. 203

All matters in difference in a cause were referred to an arbitrator, by a judge's order, so as he made his award on or before a day named, or such ulterior day as he should from time to time appoint by writing under his hand, to be indorsed on the order, "and as this court or a baron might order." The arbitrator enlarged the time, but the enlargement was not confirmed by any order. Afterwards, with the consent of the parties, a baron made two orders for further enlarging the time, and the award was made before the time last allowed by him had elapsed. Held, that the award was made in due time, and that the parties' consent to the baron's orders amounted to a fresh agreement by them to refer. *Benwell and another* v. *Hinxman and another*, H. 1835. 509

The award directed a sum found to be due from defendants to plaintiffs, to be paid on or before a particular day, and that upon payment of that sum all proceedings should cease. Held, that the award was final. *Ib.*

The arbitrator fixed a day of payment. Held, that he had exceeded his authority, and that the award was, so far only, invalid. *Ib.*

A cause and all matters in difference were referred by rule of court to an arbitrator, who awarded that a particular balance was due from the plaintiff to the defendant, but did not order the money to be paid by the plaintiff. He also awarded that the plaintiff should pay costs, without directing to whom. Held, that if an action would lie on this award, no attachment could be granted on it as for disobedience of the rule of court. *Scott and another, assignees of a bankrupt*, v. *Williams*, H. 1835. 506

In assumpsit on an award for 223*l.* 4*s.* 6*d.*, the defendant set out in his plea the award, reciting, that by agreement in writing between the plaintiff and defendant, setting forth that they had for some years carried on business as builders and excavators in copartnership, and that they had, in pursuance of the partnership, become possessed of certain messuages and premises, money, chattels, and effects, and that disputes had arisen between them touching their accounts, reckonings, and dealings, and as to a division of the said partnership messuages, &c., and other their estate and effects, and that they had agreed to refer the matter to the decision, &c. of two arbitrators named, who should have power to direct a *division* of the messuages, &c., and other the partnership effects between them, and that each party thereby agreed to execute to the other a convey-

ance of the messuages, &c., according to such division between them, as the arbitrators should award. After further reciting that the partnership had been dissolved by mutual consent, the award directed that the defendant should pay the plaintiff 223*l.* 4*s.* 6*d.* in full of all demands in respect of his one equal moiety, half-part, or share of the said copartnership property, estate, and effects; and that on payment thereof, and on having such conveyances as thereinafter mentioned tendered to him for execution, the plaintiff should, at the defendant's request, execute a proper conveyance unto and to the use of the defendant, of, in, and to certain messuages &c. therein mentioned, subject to certain mortgage debts charged thereon. Also, that all the debts then due and owing to and from the copartnership concern, should be received and paid by defendant and plaintiff in equal proportions, and that if either should advance or pay any sum over and above his half-share of the partnership debts, the amount so overpaid should, on demand, be made good, and repaid to the party paying the same by the party making default. The plea then proceeded to allege, that the several messuages, &c. directed by the award to be conveyed to the defendant, were the whole of the said copartnership messuages &c., and that there were not in the award any other provisions than those above specified concerning the said copartnership property, estate, and effects, or the division thereof, or any part thereof:—Held, on demurrer to the plea, that the award was final as well as sufficiently certain and consistent; but *semble*, that if on motion to set aside the award made in due time, it had appeared that there had been no arrangement between the partners by which the messuages &c. were awarded to one, subject to the mortgages on them, the arbitrators would have been considered to have exceeded their authority in not dividing them between the parties. *Wood* v. *Wilson*, E. 1835. 813

By an agreement to refer matters in difference, it was recited that the plaintiff and another had given notices of appeal against a poor-rate, and that the defendants, the churchwardens and overseers, intended to defend the same, but in consequence of the parties to the rate agreeing to leave the examination of it, and all matters in dispute between them, as stated in the notice, to arbitration, no appeal was entered against the rate, and that the parties, in order to prevent further expense, and to settle and ascertain the subject of the said poor's-rate, and the quality or inequality thereof, so far as the charges therein made on the plaintiff, as compared with the rate made on the other persons mentioned in the notice of appeal, had agreed to leave the matters therein mentioned to arbitration. The operative part of the agreement witnessed that the defendants (as far as they lawfully could as such churchwardens) and the plaintiff mutually agreed to abide by the award of *W. A.*, *R. D.*, and *P. B.*, or any two of them, who were to award and determine of and concerning the said matters in difference, and of and concerning all the expenses of the said agreement, and of the said notices of appeal, and of the said churchwardens, &c. And in consequence of such notice of appeal, and of

their preparation to resist such appeal and to support the rate and all matters relating thereto, the arbitrators awarded that the defendants should pay unto *T. E. T.*, attorney for the plaintiff, 16*l.* 12*s.*, his bill already delivered, and the amount of the costs of the said *T. E. T.* attending the arbitration, &c. And they further directed that the defendants should deduct from the accounts charged in all future rates the sum of 10*s.*, and return to the plaintiff the sum of 10*s.* for every rate granted and paid by him since the then scheme had come into operation. *Thorpe* v. *Cole and another*, T. 1835. 1047

The award further directed, that as a dispute was made with regard to the size of the lake occupied by the plaintiff, it should be ascertained by the parish and the rate altered accordingly, agreeable to the price per acre as set against the said lake, by the arbitrators, in a schedule to their award. In an action on the above award, the plea set out the submission and award at length, and concluded thus: "And the defendants in fact say, that the award is bad and void in law, and this they are ready to verify:"—Held, on demurrer to the plea, that it was good in form and substance. *Ib.*

Held, *Parke* B. *dissentiente*, that the submission and award were bad, on the ground that the arbitrators had no authority to determine as to the validity of the rate, it not being by law a matter capable of reference to arbitration; and that the costs incurred being merely accessory to the decision of the principal question, the consideration for the submission wholly failed. Error having been brought, the Court of Exchequer Chamber affirmed this part of the judgment of the court below, giving no opinion on the other questions. *Thorpe* v. *Cole and another*, T. 1835. 1047

Held by Lord *Abinger* C. B., that the award was also bad for directing the churchwardens and overseers to return and refund to the plaintiff 10*s.* on each rate made since the new scheme had come into operation, as that direction was not binding on them, for they could not by law comply with it, and could not be compelled to do so. *Ib.*

Held by Lord *Abinger* C. B., that the direction that the quantity of the lake occupied by the plaintiff should be ascertained by the *parish*, was too uncertain, leaving doubt as to who was to ascertain the size of the lake. *Ib.*

Held by *Parke* B. first, that notwithstanding the churchwardens and overseers could not be legally bound by the settlement of the rate made by the arbitrators, yet that the reasonable construction of the contract of submission was, that the arbitrators should do what by law they could; viz. make a valuation as a guide to the parties for their future conduct; so that the award was not void on that ground. Secondly, that the ascertaining of the quantity of the lake was a mere ministerial act, which might be delegated to another, and that the award was not void on that ground. And thirdly, that it was not on the ground that the amount of the costs to be paid by the defendants, on account of the plaintiff's expenses of notices of appeal, as well as of the agreement or counterpart, were not ascertained by the award with sufficient certainty, for as the award was made *de premissis*, it ought to be intended that the sum of 16*l.* 12*s.*

was for one of the matters submitted, viz. the costs of the notices, according to the rule that the words *de premissis* in an award have the effect of applying its general words to each particular thing submitted, and that the share of the costs payable by the plaintiff to his attorney might be ascertained by reference to the bill already delivered. *Thorpe* v. *Cole and another*, T. 1835. 1047

ARREST.

A king's chaplain is a servant in ordinary with fee, and as such privileged from arrest. *Byrn* v. *Dibdin*, Clerk, H. 1835. 357

A defendant arrested for a debt of 70*l.*, stated an account with the plaintiff, who consented to his discharge on giving a bill of exchange accepted by himself but drawn by another person:—Held, that the defendant might be again arrested on the bill, though it was a new security for the original debt, for in an action for the original debt, the bill might be well pleaded in accord and satisfaction. *Semble*, the original debt was extinguished by the defendant giving the plaintiff the additional security of a third person, the drawer of the bill. *Hamber* v. *Cooper*, E. 1835. 718

The officer of arms called *Somerset* herald, being arrested on mesne process, the court refused to discharge him on motion as a king's servant. *Leslie* v. *Disney*, M. 1834. 181

Under judge's warrant. *Gladwell* v. *Blake*. 186

The plaintiff arrested the defendant for 27*l.*, and the jury would have given a verdict for 28*l.*, but for the omission of a count applicable to 8*l.*, part of the plaintiff's demand, on discovering which their verdict was reduced to 20*l.*:—Held, that the defendant was not arrested without reasonable or probable cause, so as to be entitled to costs, under 43 *Geo.* 3. c. 46. s. 3. *Preedy* v. *Mac Farlane*, H. 1835. 355

Where the arrest was for 27*l.*, the sum named in the affidavit of debt, but the capias was indorsed by mistake for 37*l.*:—Held, that the defendant was not on that account entitled to such costs. *Ib.*

A defendant who is arrested and does not give bail, but goes to prison, is within the words "arrest and hold to bail" in 43 *Geo.* 3. c. 46. s. 3. *Ib.*

ASSAULT AND BATTERY,

1100

ASSIGNEE.

Suing as. See VARIANCE.

ASSIGNOR AND ASSIGNEE OF LEASE.

Liability on covenants, 692.

ASSIGNMENT.

Of personalty without possession, effect of, 316.

ASSUMPSIT.

Assumpsit for not delivering linseed according to contract. It appeared that under the contract the vendee had paid part of the purchase-money in advance to the vendor, who, about the time at which he ought to have delivered the linseed, gave notice that he could not do so. After the action was brought, the purchase-money was paid back by the defendant into court with interest to the time of such payment; such payment being

a condition imposed by the court before granting him a commission to examine witnesses abroad. No evidence was given of special damage from the breach of contract or the privation of the money advanced to the defendant, or of the object for which the seed was wanted by the plaintiffs:—Held, that the damages were not to be estimated by the advanced price borne by linseed at the time of the trial, but by its price at the time when it ought to have been delivered according to the contract; and a verdict founded on that principle was confirmed. *Startup* v. *Cortazzi*, E. 1835. 697

ATTACHMENT.

Of witness. *Dixon* v. *Lee*, 180.
Of Sheriff. See 184.
A rule to show cause granted on 42 *Geo.* 3. c. 99. s. 2., calling on an executor to account to the commissioners of stamps for the testator's personalty, was served on the executor, but after repeated attempts to serve him with the rule absolute, the service could not be effected. The court, on a strong affidavit of the facts, granted a rule nisi for an attachment, unless cause shown in eight days, directing that rule to be served personally. *In re estate and effects of Barwick*, H. 1835. 431
A judge's order had been made a rule of court, and personally served on the party called on to act according to its exigency. A rule was afterwards obtained to show cause why an attachment should not issue against the party for disobeying that order, but was not personally served on him:—Held, that appearance by counsel, who showed cause against the rule, relying on want of such personal service, waived the irregularity; and the rule was made absolute for issuing an attachment. *Levy* v. *Duncombe*, H. 1835. 490

ATTORNEY.—See SUNDAY.

A summons to refer an attorney's bill for taxation, followed by a judge's order for that purpose, will not prevent the attorney from commencing an action on his bill, or operate as a stay of proceedings. *Williams* v. *Roberts*, H. 1835. 421

ATTORNEY AND SOLICITOR.

Where an attorney is arrested and held to bail by a person who is cognizant of his privilege, trespass is not maintainable. *Noel* v. *Isaac and Others*, H. 1835. 376
Abode of, stating in notice. 583
Where an attorney of this court permits an attorney of another court to practise in it in his name, the proceedings, notices, &c., must be in the name of the former *only*. *Chadwick* v. *Hough*, E. 1835. 705
Lien for costs. 840
Where the master, in taxing an attorney's bill of costs for carrying on three actions for the defendants, found that one of them had been improperly brought, and therefore disallowed the whole costs of that action, by which step more than one-sixth of the bill was taken off:—Held, that the attorney was liable to pay the costs of taxation under 2 *Geo.* 2. c. 23. s. 23., though the material deduction was not caused by overcharges in any particular items, but by the striking out one branch of the plaintiff's charges. *Morris* v. *Parkinson*, E. 1835. 772

AUDITA QUERELA.

Unless a party appears to the court to be clearly entitled to an auditâ querelâ, they will not grant him,

that the bail-bond will stand as a security, on stay of proceedings against the bail, (*Reg. Gen. Hil.* 2 *W.* 4. No. V.) *Baisley, assignee of the Sheriff of Middlesex* v. *Newbould and two Others, his bail*, E. 1835. 821

BANKRUPT.

At the trial of an action by assignees of a bankrupt to recover goods and chattels from parties claiming under a prior assignment by the bankrupt, the plaintiffs produced the latter deed in pursuance of notice to that effect from the defendants. Held, that the plaintiffs might read it in evidence, without proving its execution, though they sought to impugn its validity for fraud. *Carr and Others, assignees of Clapham, a bankrupt,* v. *Burdiss and Another*, H. 1835. 309

To a declaration in trover by the assignees of a bankrupt to recover damages for goods, chattels, and fixtures, alleged to be in the possession of the bankrupt at the time of his bankruptcy, and to have been since converted by the defendants, they pleaded that before the bankruptcy the bankrupt assigned the goods to them by deed, who before the bankruptcy took possession of them, and kept and retained such possession afterwards. The plaintiffs replied, that the defendants did not take possession of the goods before the bankruptcy. Issue was joined thereon, and a verdict found for the plaintiffs upon it. Held, that the issue was immaterial, because the assignment by deed conveyed the property in the goods to the defendants, and the continued possession of the assignor only amounted to evidence of fraud. *Ib.*

Semble, that the "possession" of the assignees under the deed was not sufficiently averred to be an exclusive possession. *Ib.*

Quære, if the payment of a country bank note to a creditor, without pressure, and with intention to prefer him to other creditors, is an act of bankruptcy under 6 *Geo.* 4. c. 16. *Ib.*

Action by assignees of, against sheriff.—See SHERIFF.

In an action by assignees of a bankrupt for goods sold and delivered by the bankrupt before his bankruptcy, the plea denied their title as assignees, and a notice to dispute the trading &c., was given, pursuant to 6 *Geo.* 4. c. 16. s. 90. Letters from the defendant to one of the assignees, and to the solicitor to the commission, deprecating proceedings against him, are primâ facie evidence in admission of the plaintiffs' title to sue as assignees, without the regular proof of the bankruptcy. *Inglis and Another, assignees of T. J. Spence*, v. *George Spence*, M. 1834. 8

Form of plea of French bankruptcy. 945

In trover by a bankrupt against his assignees to try the validity of the commission:—Held, that secondary evidence of the assignment might be given after proving that it was lost before it was entered of record, as directed by 6 *Geo.* 4. c. 16. s. 96., and 2 & 3 *W.* 4. c. 114. s. 7. *Giles* v. *Smith*, M. 1834. 15

Semble, proof of the plaintiff's acquiescence in the defendant's acts as assignee, and dealing with him in that character, would render proof of the assignment unnecessary. *Ib.*

Premises were let for 21 years to *A.*, his executors, administrators and assigns, with a proviso, that if the lessee, his executors, administrators or assigns, should become bankrupt or insolvent, or suffer

BANKRUPT, COMMISSIONERS OF.

A town commissioner of bankruptcy, appointed under 1 & 2 *W.* 4. c. 56, and sitting alone, had no power (before 5 & 6 *W.* 4. c. 29. s. 25.) to fine or commit for contempt. *Semble*, that where the question of the legality of a fine imposed for contempt of court comes before the court of Exchequer on motion, the court will not inquire into the nature of the alleged contempt. *Rex* v. *Faulkner*, T. 1835. 915

BANKRUPTCY.

A trader and soap manufacturer being indebted to his bankers in a sum of 13,147*l.* 7*s.* 5*d.* assigned to them his leasehold property, with all his engines, machines, &c., stock in trade and effects upon the same, in order to secure as well money then due, as money to be thereafter due from him to them on the balance of his account. The bankers had a power to sell the whole property assigned, including a policy of insurance on the life of the trader; but he was at liberty to remain in possession till default made in payment. At the time of executing the assignment, the trader was possessed of other property worth 13,000*l.* which was not covered by it. The trader having become bankrupt, his assignees sued to recover the property assigned; but the jury found that the deed was executed, not in contemplation of bankruptcy, but with intent to give the defendants the means of taking possession of the property in the event of bankruptcy. Held, that the assignment was good, and did not amount to an act of bankruptcy. *Carr and Others, Assignees of Anthony Clapham a bankrupt*, v. *Burdiss and Brumell*, M. 1834. 136

Act of bankruptcy by conveyance of all a trader's goods. 136, 309, 493, 965

BANKER.

Hours of business for paying bills. *Whitaker* v. *Bank of England.* 268

BELLMAN.

In corporate town. 361

BENCH WARRANT.

Gladwell v. *Blake.* 186, 194

BILLS AND NOTES.

See PLEADING.

Recovering on bill indorsed after due. 172

Accommodation bill. 172

The plaintiffs, who kept an account with the Bank of *England* as private bankers, accepted a bill payable there, which was refused payment at eleven o'clock in the morning of the day it became due, for want of sufficient assets. It was presented there again by a notary at six in the evening, after the usual hours for payment of bills at the bank had elapsed, but a party left at the bank gave the same answer as in the morning, though in the course of the day a sum sufficient to answer the bill had been paid in. The plaintiff sued the bank, not for neglecting to inform the notary that they had received assets, since the former presentment, and that the bill would be paid the next day, but for dishonouring the bill, though they had had sufficient assets in their hands to pay it, and for a time sufficiently long to enable them and their clerks to know that fact: Held, that in the absence of proof of specific agreement to

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the contrary, the defendants were not bound to pay the bill on its last presentment, that being made after the usual hours of business; and were therefore not liable to the action. *Whitaker* v. *The Governor and Company of the Bank of England*, H. 1835. 268

Pledging bills by bill-broker. *Wood* v. *Poole*. 255

When a note is payable fourteen days after date, and is not deposited as a collateral security, nor is the consideration disputed, no parol testimony is admissible to prove any agreement that it was not to be paid if a verdict was obtained in an action then pending between other parties; for that would be to contradict a written contract by parol evidence. *Foster* v. *Jolly*, H. 1835. 239

Assumpsit by the drawer against the acceptor of a bill of exchange. Plea, that before the *acceptance* of the bill by the defendant it was agreed between him and the plaintiff that plaintiff should consign to *N*. certain goods, out of the proceeds of which plaintiff should direct *N*. to pay to defendant a sum equal to the amount of the bill, and that in case the proceeds should not have arrived in *England*, when the bill became due, the plaintiff should renew it. Averment, that proceeds had not arrived when the bill became due, that plaintiff declined to draw another, and that it was thereupon agreed that defendant should write to *N*. directing him to pay the whole proceeds to plaintiff—that defendant thereupon wrote such letter and delivered it to plaintiff; and lastly, that defendant had not received any consideration for the payment of the bill:—Held, that the plea was bad on special demurrer, for repugnancy in not confining the allegation of want of consideration to the non-receipt of proceeds since the letter to *Norman*. *Byas* v. *Wyke*, H. 1835. 377

A bill for 18*l*. was dishonoured at maturity, whereupon the indorsee agreed to take from the drawer 8*l*. in cash and another bill for 10*l*., drawn and accepted in like manner as the first. The second bill was accordingly drawn, accepted and indorsed to the plaintiff, but while it was in the drawer's hands, the acceptor, without his knowledge, altered the date of it to a subsequent day:—Held, that as the second bill was vitiated by the alteration, so that it could not be enforced against the drawer, he remained liable for 10*l*. on the original bill. *Sloman* v. *Cox*, M. 1834. 174

A bill of exchange was indorsed specially to the plaintiffs by the payee. Next after the special indorsement, and before any indorsement by the plaintiffs, the defendant indorsed it. Lastly followed the plaintiff's indorsement: Held, that the defendant's indorsement operated not as a transfer of the property in the original bill, but as a new drawing by the defendant, who became thereupon liable to an action on the bill at suit of the plaintiff, without any necessity for a fresh stamp. *Penny, surviving partner of Brooks*, v. *Innes*, M. 1834. 107

The plaintiff being drawer and payee of a bill of exchange, handed it to *H*. to get discounted. *H*. offered it for that purpose to the defendant, stating that it was not his, but the plaintiff's bill. Defendant refused to discount it unless indorsed by *H*. *H*. said that he had no interest in it, but to facilitate its being cashed he would indorse it. He did indorse it; upon which defendant took the bill, paid *H*.

only a part of its amount, and got it discounted by one *G.* The plaintiff was obliged to take it up at its maturity, and sued the defendant on it for the balance unpaid to *H.* A verdict for defendant was set aside as against the evidence, and a new trial was awarded to try the question whether the plaintiff was in reality the owner of the bill at the time it was indorsed, and not whether or not he had at that time been represented to be so by *H.* *Bastable* v. *Poole*, M. 1834. 111

In an action on a promissory note for 500*l.* by indorsees against indorser, the plea was, that except as to 200*l.* one *A.* made and delivered the note to defendant for indorsement by him for the accommodation of *A.* and to enable him to obtain advances of money thereon, and without any other purpose or consideration, and that it was indorsed by the defendant to enable *A.* to obtain advances from the plaintiffs, but that they advanced only 200*l.*, and that there was no consideration for the residue of the note. Replication, that the plaintiffs were holders of the note for valuable consideration given by them to *A.* in respect of their being holders of such note, to its full amount. *A.* was a customer of the plaintiffs, who were bankers, and owed them above 500*l.* at the time that the note indorsed by defendant was deposited with them. They examined the account, entered it in their books as discounted for *A.*, charging him with the discount, and advanced him 198*l.* upon the credit of it. Held, first, that upon this issue the defendant was bound to begin by impugning the plaintiffs' title to the note; secondly, that the discounting the note for *A.* by the plaintiffs, after inspecting his account, was equivalent to their advancing him the whole amount of it; thirdly, that if the note was given to the plaintiffs, and received by them in part-payment of, or as a security for a previous debt due from *A.*, or if they gave credit to him on the faith of *A.*, they were properly stated to be holders for valuable consideration. *Percival and Others* v. *Frampton*, E. 1835. 579

The defendant bought premises at an auction, and gave the plaintiff, who was an auctioneer, a draft on his banker, instead of money, in payment of the deposit. Having afterwards refused to pay the draft on account of misdescription of the property by the plaintiff, he pleaded to an action on the draft by *B.* that "there was not, at any time, any consideration or value for his making the draft, or for paying its amount." Issue having been taken, the jury found the plaintiff guilty of a wilful misrepresentation in the description of the premises:—Held, 1st, that the draft having been in point of law given without consideration, the defendant could have rescinded the contract; and might therefore resist payment of his draft, on the ground that the contract, which was the consideration, having been done away ab initio, no consideration remained at all, and therefore, that *after verdict* the plea must be taken to have been proved; 2dly, that the plea would have been bad on special demurrer, for not containing an affirmative allegation, pursuant to the new rule of pleading, *Hil.* 4 *W.* 4. No. I. *Assumpsit*, s. 3. *Mills* v. *Oddy*, E. 1835. 571

Whether this was a transaction "void or voidable in point of law on the ground of fraud," within that rule, and therefore to be specially pleaded, *quære.* *Ib.*

Failure of consideration of bill, 574, and *Easton* v. *Pratchett*, 1129.
Discounting, 579
In an action by a second indorsee against the acceptor of a bill of exchange for 98*l.* 5*s.* 3*d.*, the replication admitted that the acceptance and first indorsement were without consideration, and took issue on the point whether the party immediately indorsing to the plaintiff had good consideration for so doing. The plaintiff relied at the trial on the mere production of the bill; the defendant objected that the plaintiff was bound to prove the consideration. The judge dissented, but gave the plaintiff an option to prove it, upon which he established a debt of 57*l.*, due to him from the drawer and first indorser, and another debt to the amount of 20*l.* 18*s.* due to him from his immediate indorser for goods sold:—Held, upon this evidence, that the plaintiff was not entitled to recover more than the amount due to him from his immediate indorser. *Simpson* v. *Clarke*, E. 1835. 593
Whether the remote holder of an accommodation bill is bound to prove consideration in the first instance, as in the case of a bill obtained by the first holder by fraud or felony, or whether the indorsement of itself primâ facie imports consideration until the defendant proves the contrary, was not decided. *Ib.*
Debt on a promissory note. Plea, that after the making of the note and accruing of the debt in respect thereof, the plaintiff drew a bill of exchange on the defendant, which he accepted, and *delivered to the plaintiff, who took it for and on account of the note*, and afterwards indorsed it to a person unknown to the defendant, and who at the time of the commencement of the suit was the holder thereof, and entitled to sue the defendant thereon. Replication, *de injuriâ sua propriâ*, and demurrer thereto. Held, that the first fault was in the plea, which was bad for not averring that the bill was given by the defendant in satisfaction of the note, or that the plaintiff accepted it in like manner. *Crisp* v. *Griffiths*, E. 1835. 619
A bill of exchange purporting to be drawn in *London*, payable to the order of the drawer 'in *London*,' upon a party resident at *Brussels*, and accepted by him payable in *London* at a place named, is not a foreign but an inland bill, and must be stamped accordingly, under 55 *G.* 3. c. 184. *Amner* v. *Clark*, T. 1835. 942
Where written notice of the dishonour of a bill has been given to the party sued, it is unnecessary to give him notice to produce that notice, in order to adduce secondary evidence of the notice of dishonour. *Swaine and Others, Assignees of a Bankrupt*, v. *Lewis*, T. 1835. 998
See PLEADING.
On a plea in an action on a bill of exchange, that the defendant never accepted the bill in the declaration mentioned, the defendant may give in evidence the alteration of the bill after its acceptance, and without his the defendant's knowledge. *Cock* v. *Coxwell*, T. 1835. 1077
Wood & *Poole* were bill-brokers in *London*. Messrs. *Fosters*, merchants and capitalists, had large transactions with them. *W.* & *P.* were possessed of bills amounting to nearly 3000*l.*, which had been placed in their hands by different customers to raise money on for the latter. *W.* & *P.* having mixed these bills with others belonging to themselves, handed over the whole to the defendants as a security for 3000*l.* then advanced, as

well as for two sums of 2000*l.* and 550*l.* previously advanced them, on their engagement to give bills to cover the amount in a short time. It was proved to be customary for bill-brokers in *London* to pledge the bills of their various customers together for an advance to themselves of one gross sum on all of them, or even to pledge them as a security for former advances made to the bill-brokers; and that each customer looked only to the bill-broker to whom he had given dominion over his bill. *Foster and Another* v. *Pearson and Others. Stephens* v. *Foster and Another*, H. 1835. 255

An action of assumpsit having been brought by Messrs. *Fosters* on one of the bills thus handed over by *W.* & *P.* against one of *W.* & *P.*'s customers, whose name was on it, the judge left it to the jury to say, whether the plaintiffs took the bills from *W.* & *P.* the bill-brokers, with due caution and in the ordinary course of business? The jury were of opinion in the affirmative, and found a verdict for the plaintiffs:—Held, that the direction was right. *Ib.*

An action of trover was brought by a customer (himself a bill-broker) against Messrs. *Fosters*, to recover the value of some of the bills thus handed over to them. The judge told the jury, that a bill-broker being an agent for the purpose of getting bills discounted, has by the general law no right to mix bills received by him from his customers merely to get discounted, with bills of other customers, and to pledge the whole in a mass, in order to obtain a loan of money to himself: and still less has he a right to deposit bills received merely for the purposes of discount, as security or part security for money previously due from him; but added, that parties might, by contract between themselves, avoid that general rule of law. He then left it to them to say, whether the usage alleged to exist in *London*, viz. that by putting a bill into a bill-broker's hands the customer gives him an absolute dominion over it, to do with it as he likes, looking to the credit of the bill-broker only as the person responsible either for the money or the return of the bill, was proved to their satisfaction, and if they thought it was, whether they thought that the plaintiff, who was himself a bill-broker, had contracted with reference to that usage. The jury found for the defendants, and the court refused to disturb the verdict. *Foster and Another* v. *Pearson and Others. Stephens* v. *Foster and Another*, H. 1835. 255

The duty of a bill-broker is one which depends entirely on the course of dealing. His powers may vary in different places, and are questions of fact to be resolved by the course and usage of dealing in the particular place. *Ib.*

Semble, the rule of law "That the holder of bills of exchange indorsed in blank, or other negotiable securities transferable by delivery, could give a title which he himself did not possess to a bonâ fide holder," is not to be departed from, or qualified by adding, as an essential ingredient, that the person taking the bills should take them with due care and caution; unless his absence of caution should affect the bona fides of the transaction. *Ib.*

As to the power of a bill-broker to pledge his customer's bills for an antecedent debt of his own, *quære*. *Ib.*

BOARD OF GREEN CLOTH. 355

BOND. 639

BYE-LAWS.

See *Jones* v. *Waters, &c.* 361

CAPIAS. See WRITS.

CAPIAS AD SATISFACIENDUM.

See WRITS.

CARRIERS.

In an action on the case, the defendants were charged as carriers for negligence in carrying goods, but the proof showed that if liable at all, they could only be sued as wharfingers on a contract to *forward* them. In the course of the cross-examination of the defendants' witnesses, it appeared that the defendants had put forth bills announcing themselves as carriers, and repudiating their liability for losses of which they did not receive notice within a specified time. No knowledge of these bills was brought home to the plaintiff, nor did it appear that he gave the defendants the notice required. After the defendants' case was closed, and just before the counsel for the plaintiff began to reply, he requested to amend the declaration, under 3 & 4 *W.* 4. c. 42. s. 23. The judge refused the amendment, and left it to the jury to say whether the contract was to carry the goods, or only to forward them. This finding being indorsed on the postea under 3 & 4 *W.* 4. c. 42. s. 24. a verdict was taken for the defendants, subject to the opinion of the court, whether the amendment should be allowed. The amendment was allowed, (*Alderson* J. dissentiente,) and a new trial was granted on payment of the costs of the first trial, as well as of the motion and the amendment; for the amendment should have been allowed, and the trial postponed to a subsequent day, in order to admit further proof by the defendants under s. 23. *Parry* v. *Fairhurst and Others*, E. 1835. 685

CAUTION.

In taking bills of exchange, &c. *Wood* v. *Poole*. 256

CHASTISEMENT. 975

CIRCUITY OF ACTION. 110

COGNOVIT.

A defendant, while in custody on mesne process, agreed to execute a cognovit. The clerk to the plaintiff's attorney told him he must have an attorney present on his behalf. His own attorney being absent from the town, the clerk suggested to the defendant that *C.*, another attorney, would act in the matter for him. The defendant answered, he did not care much who it was, and went to his, *C.*'s, office. *C.* then asked the defendant if he wished him to attest his execution of the cognovit. Defendant answered, yes, and prevented him from reading it over, saying he knew its contents: Held that this was an "express naming" of the attorney within *Reg. Gen. Hil.* 2 *W.* 4. No. 72. *Bligh and another, Executors of J. M. Bligh*, v. *Brewer*, M. 1834. 222

COMMISSIONERS.

Acting in execution of local act. 476

COMMITMENT.

Supporting by conviction.
See CONVICTION.

COMMON PLEAS AT LANCASTER.

A motion for a new trial under 4 & 5 *W.* 4. c. 62. s. 26, in an action brought in the Common Pleas at *Lancaster,* must be made in the court of which the judge who presided at the trial is a member. *Foster* v. *Jolly,* H. 1835. 239
All 15 judges are judges of. 221
Motion to enter up judgment *non obstante veredicto* in, cannot be made in banc, in a court at *Westminster,* under 4 & 5 *W.* 4. c. 62. s. 26. *Potter* v. *Moss,* H. 1835. 512

COMPOSITION WITH CREDITORS.

Assumpsit on bills of exchange. Plea, that the defendant was also indebted to Sir *W. R.* and divers other persons, in divers other sums of money, of which the plaintiffs had notice, and that afterwards and before the said bills became due, and whilst he was so indebted to the said Sir *W. R.,* and the said other persons, he, the defendant, became insolvent and unable to pay his debts. That thereupon, in consideration of the premises, and with the view and intention of inducing, and of enabling the said defendant to induce the other creditors of the defendant to accept and receive a composition of one moiety of their debts, and in consideration that the defendant would pay to them, the plaintiffs, half the amount of the said bills when the same respectively became due, the said plaintiffs agreed to accept a composition of one half the amount of the bills as they became due; and that afterwards, the said agreement so made and entered into by the plaintiffs, was by the defendant, with their knowledge and by their direction, represented and made known to the said Sir *W. R.,* so being such creditor as aforesaid, who thereupon, in consideration of the premises, and in faith of that agreement, was lured and induced to accept that composition; and that he, the said Sir *W. R.,* had not at any time since recovered or received, or sought to recover or receive any greater or other sum than half the amount of his said debts: Held, on motion for judgment for plaintiffs, notwithstanding a verdict for defendant, that this plea was bad, for not showing that all, or at least that the majority of the defendant's creditors had assented to the arrangement, and agreed to take the composition. *John Reay, John Reay the younger, and Henry Reay* v. *Walter Richardson,* T. 1835. 931
The terms of the agreement for the composition, were contained in a letter from one of the plaintiffs; the court admitted proof of a previous conversation of the witness with the plaintiffs and defendant, in which the plaintiffs inquired what the other creditors were likely to do, as evidence of the motive which induced him to write the letter, and of the object for which the agreement was projected to be entered into. *Ib.*

CONVEYANCE.

By insolvent trader for benefit of creditors: *quære,* if void, under 7 *G.* 4. c. 57. s. 32. as a "voluntary conveyance?" See 963.

CONCURRENT WRITS. 981

See WRITS.

died without issue:—Held, that these words meant heirs male of the body, and consequently that after the deaths of the particular tenants, the reversion descended to the lessor of the plaintiff, who was the devisor's youngest nephew, as his customary heir, and did not pass by the ultimate limitation to the defendant, who was heir male general, being the son of the devisor's great niece, *S. E. Doe* d. *Richard Eustace* v. *Easley*, H. 1835. 450

COPYHOLD AND COPY OF COURT ROLL.

Lands held by copy of court roll according to the custom of the manor, but not according to the will of the lord, are sufficiently copyhold to pass by will under 55 *Geo.* 3. c. 192. without previous surrender to the uses thereof, though it was found by a special verdict, that before that act passed there did not appear on the court rolls of the manor any entry of a surrender of lands, parcel of the manor and held by copy of court roll thereof, to such uses as should be declared by the last will of the person making such surrender, for no custom in the negative, viz. that copyhold surrendered to the use of a will should not pass by it, was found. *Doe* d. *Edmunds and Another* v. *Llewellyn and Another*, T. 1835. 899

If such negative custom had been found, *semble*, it would have been bad. *Ib.*

By will dated after the passing of 55 *Geo.* 3. c. 192. a testator devised "All the rest, residue and remainder of his estate whatsoever and wheresoever, and of what nature or kind soever the same may be." Held, that copyhold estate would pass by these words as by a general devise of real estate, though the testator had made no surrender in his lifetime to the use of his will. *Doe* d. *Edmunds and Another* v. *Llewellyn and Another*. 899

CORPORATE TOWN.

See CUSTOM.

CORPORATION.

See *Jenkins* v. *Harvey*. 514, 718

COSTS.

In order to review a taxation by the master for disallowing the expenses of detention of a foreign witness in this country, it should be shown that the master did not exercise his discretion on the subject after special grounds for the allowance had been laid before him. *White* v. *Mayor*, H. 1835. 487

The *Lincoln* local improvement act, 9 *Geo.* 4. c. 27. prohibited certain commissioners from acting in execution of the act when personally interested, and imposed a penalty on them for so doing. By a subsequent clause it enacted, that if an action was brought against any person *for any act or thing done in execution of, or under the authority of the act*, and the plaintiff should be nonsuited, the defendant should recover treble costs. The plaintiff sued the defendant for a penalty upon the act, for acting in execution of the act, being personally interested, and was nonsuited.—Held, that the defendant's acting as a commissioner was not *an act or thing done in execution of or under the authority of the act*, so as to entitle him to treble costs. *Charlesworth* v. *Rudgard*, H. 1835. 476

On a trial under a writ of trial, a verdict was recovered for less than

5*l.* The plaintiff signed judgment and issued execution in vacation. On the first day of the next term, the defendant applied to enter a suggestion on the roll to deprive the plaintiff of costs, on an affidavit that at the time the cause of action accrued, and till a day named, he had a warehouse and counting-house, and after that day, down to the time of commencing the action, he had a house and warehouse, all in the city of *London*, where he resided and carried on the business of a silk-broker, and that he had, from *January* 1833, sought his livelihood, and still seeks it in the city, by carrying on his trade and business at the said houses and warehouses respectively. (See 39 & 40 *G.* 3. c. 104. s. 12.) Held, first, that the affidavit was sufficient to deprive the plaintiff of costs; secondly, that the defendant had moved in time; thirdly, that he need not state when the action was commenced; and lastly, that the defendant's consent to the writ of trial had not taken away his right to enter a suggestion for costs. *Bond* v. *Bailey*, E. 1835. 796

A declaration in trespass against four defendants, contained two counts, one for assault, the other for seizing a fishing-net. The verdict was against one defendant on the first count, and for him on the other, under 7 & 8 *G.* 4. c. 29. s. 35., and for all the other defendants on both counts:—Held, that the defendant, who was found guilty of the assault, was entitled to deduct the costs of a witness called in his defence on the second count only, from the plaintiff's costs on the first count; but was not, as it would seem, entitled so to deduct the costs of other witnesses called for the defence on the second count, who were also examined as to the first. Held, also, that as the other three defendants must be taken primâ facie to have joined the first in employing the attorney, they were each entitled to a fourth share of their costs, to be paid them by the plaintiff, or set off against the costs payable to him by the defendant, who was found guilty; unless indeed it should appear to the master on taxation, that the attorney was employed on the sole responsibility of that single defendant, without any retainer by the rest. *Starling* v. *Cozens and three Others*, E. 1835. 823

Where a verdict is given for one or more of several defendants who obtains a verdict, and against another or others of them, the former, though pleading separately by separate attornies, are primâ facie entitled to their aliquot proportion of the full costs incurred on their joint retainer; and this without taking into account 3 & 4 *W.* 4. c. 42. s. 32. *Griffiths* v. *Jones and Others*, T. 1835. 1092

Of motion for arresting for more than sum recovered. 357

Security for, after new trial ordered, 408

Treble costs on party-wall act, 14 *G.* 3. c. 78. See PARTY-WALL.

Of witness to prove hand-writing to deed. 788

Attachment for not paying.

See PRACTICE (*Attachment*).

Judge's order as to.

See JUDGE'S ORDER.

Of executing inquiry. See INQUIRY.

Remedy for on judge's order or rule of court. 800

COUNTS.

The 'common counts' are separate counts. 524

COUNTY COURT.

See SHERIFF.

COURT OF RECORD, 915.

COURT OF REVIEW.

Rex v. *Faulkner*, 915.

COVENANT, ACTION OF.

See EXECUTORS.

COVENANT.

Joint or several. See *Lane* v. *Drinkwater*, 40.

To repair. See LEASE.

CREDIT.

Giving in account is equivalent to payment. 158

CREDITORS, COMPOSITION WITH.

See PLEADING.

CUSTOM.

A custom within a borough and corporate town, that the town-crier, appointed by the bailiff thereof for the time being, who during his office is lord of the manor, shall have the exclusive right to proclaim by sound of bell, the sale of all goods brought within the borough to be sold by auction there, is a legal custom. *Jones* v. *Waters*, H. 1835. 361

CUSTOM OF COUNTRY.

A declaration alleged that the defendant undertook to cultivate and manage a farm and lands "according to the course of good husbandry, and the custom of the country where they were situate;" and then averred, that according to the course of good husbandry, and the custom of the country, the defendant ought to have had about one-half only of the arable lands in corn, one-fourth in seeds, and the remaining fourth in turnips or fallow: and alleged as a breach, that the defendant had more than one-half in corn, had no seeds, and less than the proper quantity of turnip fallow. Plea: traversing the custom, and not the instances of mismanagement. The jury found that the defendant had managed the farm contrary to the course of good husbandry in the neighbourhood, but denied the custom as laid by the plaintiff:—Held, that the plaintiff was bound to prove the custom as laid in the declaration, and not having so done, was not entitled to recover. *Angerstein* v. *Handson*, H. 1835. 383

CUSTOMS, DUTIES, AND LAWS OF.

The act for the general regulation of the customs, 3 & 4 *W.* 4. c. 52., enacts by s. 20., that goods taken or delivered out of *any warehouse*, not having been duly entered, shall be forfeited:—Held, that a king's warehouse, as ascertained by s. 119. of that act, is a "warehouse" within that section. *Attorney-General* v. *Vondiere*, M. 1834. 206

By s. 28. of the Smuggling Prevention Act, 3 & 4 *W.* 4. c. 53., if goods which shall have been warehoused "*or otherwise secured* for home consumption or for exportation, shall be clandestinely removed from or out of *any warehouse* or place of security," they shall be forfeited. *Ib.*

Quære, whether a king's warehouse, as ascertained by s. 119. of 3 & 4 *W.* 4. c. 52. in which goods have been deposited for security of duties, is within s. 28. of 3 & 4 *W.* 4. c. 53? *Ib.*

The first count of an information founded on s. 45 of 6 *G.* 4. c. 108., charged the defendant with assisting "and being otherwise con-

cerned" in unshipping goods liable to the duties of customs, those duties not having been paid or secured. The second count charged that certain goods liable to the payment of duties, which had been unshipped without their having been paid, came to the hands and possession of the defendant, he well knowing that the same had been "illegally unshipped." The last count charged that the defendant knowingly harboured, kept, and concealed certain goods liable to the payment of duties, he well knowing that the same were goods which had been "illegally unshipped." The proof was, that foreign silk had been received from a boat in the *Downs*, a mile or two from shore, within the limits of the port of *Dover*, as assigned by the commissioners acting under 13 & 14 *Car.* 2. c. 11. by the master of a hoy, which being on its voyage to *London*, the defendant had hired so to receive it. When brought by the hoy into the *Thames* they were seized within the port of *London*. Verdict for the crown:—Held, first that it was borne out by the evidence; for the defendant being within the *United Kingdom*, viz. at *Dover*, was concerned in the "unshipping" by having hired the master of the hoy to receive the goods on board. Secondly, that supposing the place where the unshipment was made not to be within "the *United Kingdom*" in the sense intended by 6 *G.* 4. c. 108. s. 45., still that when the master of the hoy, acting as the defendant's agent, brought the silk into the port of *London*, the defendant was properly charged in the second count with having them in his possession. *Attorney-General* v. *Tomsett*, H. 1835. 514

The crown has a right to the reply on a motion for a new trial after verdict for the crown. *Attorney-General* v. *Tomsett*, H. 1835. 514

It is no answer to an action by a foreigner, to recover the amount of a bill accepted for goods sold and delivered abroad to the acceptor, a *British* subject, that the seller was aware, at the time of the sale and delivery, that the purchaser intended to smuggle them into this country without paying the legal duties, and paid a less sum for them than their real value. *Pellecat* v. *Angell*, T. 1835. 942

In an information on 3 & 4 *W.* 4. c. 53. s. 44., the Smuggling Act, for illegally removing goods from any warehouse or place of security in which they shall have been deposited, a 'king's warehouse' may be described as a 'warehouse.' *Lowe* v. *Attorney-General*, in Error, T. 1835. 1133

DAMAGES.

For not delivering cargo at time fixed. 697

DEATH IN TERM.

See Sittings in Term.

DECLARING.

De bene esse. 231, 821

See Bail and Bail-bond.

DEED.

Not affected by subsequent parol agreement.

See Agreement.

DE INJURIA.

In debt. 619
In assumpsit. 625, 632

DEMURRER.

A rule obtained on *Reg. Gen. Hil.* 4

W. 4. No. 2. for setting aside a demurrer as frivolous, must be drawn up on reading the pleadings demurred to with the demurrer and marginal statement, or will be discharged. *Howarth* v. *Hubbersty*, H. 1835. 391

Office copy of affidavit stated that the deponent *said* instead of *saith* :—Held bad. *Ib.*

No costs allowed for appearing to support a demurrer which has been entered in the paper before joinder, and without delivering demurrer books to the judges. *Ib.*

A declaration in one count stated a promise to the plaintiff and *H.* in his life-time, now deceased. In another count it stated, that in the life-time of *the said H.* the defendant was indebted to the plaintiff and *the said H.*, and promised the plaintiff and *the said H.* in his life-time to pay, without stating that *H.* was since dead. Defendant pleaded to the first count, and demurred to the second, for not averring the death of *H.* The demurrer was set aside as frivolous, under *Reg. Gen. Hil.* 4 *W.* 4. No. 2. *Undershell* v. *Fuller*, H. 1835. 392

A demurrer by the crown in a revenue cause need not have a marginal statement of the point to be argued, for the general rules of the three courts of common law, made pursuant to the 3 & 4 *W.* 4. c. 42. s. 1., do not extend to matters over which they have not concurrent jurisdiction. *Rex* v. *Woollett*, E. 1835. 786

A demurrer by the crown in a revenue cause should be signed by the *Attorney-General* before its delivery. *Ib.*

DEPARTURE.

From a port. 496

See PLEADING. *Young* v. *Beck*, 24

DESCENT.

See COPYHOLD.

DESCRIPTION.

Of residence. 198

See WRIT.

DEVISE.

See STAMPS.

A testator, after directing his debts and funeral expenses to be paid by his "executrix hereinafter named," bequeathed to his heir-at-law 100*l.*; and then gave to his daughter, whom he made sole executrix, all and singular his lands, tenements, and messuages "by her freely to be possessed and enjoyed:"—Held, that the daughter took only a life estate. *Doe on the demise of Joseph Ashby and Others* v. *Baines*, E. 1835. 655

G. B. by will devised his lands to his daughter for life, remainder to her sons and daughters successively in tail, remainder to his son for life, and his sons and daughters in tail; "and for default of such issue, to the *younger branches* of the family of *B. W.* and their heirs, to be equally divided amongst them as tenants in common; and in default of such issue, to the *elder branches* of the family of *B. W.*" (in similar terms). At the time the will was made, two daughters of *B. W.* were living, one of them having four daughters living, the other being childless, and past child bearing. There were also an only son of *B. W.*'s eldest son, and an only son of his third son. The state of *B. W.*'s family remained the same at the death of *G. B.* the testator. But at the expiration of the last estate tail, 56 years afterwards, there were many descendants living of one of

B. W.'s daughters, as also of his third son:—Held, that the devise was void for uncertainty, and that the remainder in fee, after the extinction of the estates tail, descended to the heir at law. *Doe* d. *Smith and Another* v. *Fleming*, T. 1835. 1013

DIRECTION.

In will to sell land. 680

DISCONTINUANCE OF WRIT.

See WRIT.

DISCONTINUANCE.

On record:—

Assumpsit on a bill of exchange for 65*l.*, with an indebitatus count, concluding to the plaintiff's damages of 200*l.* Pleas: as to 35*l.*, parcel of the money in the bill, that defendant accepted the bill, so far as respected that sum, for the plaintiff's accommodation, on terms stated in the plea. As to the sum of 40*l.*, other parcel of the sums in the declaration mentioned, the defendant pleaded payment of that sum into court, and that plaintiff had not sustained damages to a greater extent than the said sum of 40*l.* in respect of the cause of action in the said declaration mentioned *as to that sum*. Verification. And as to the residue of the said sums and premises in the last count, non assumpsit. The replication took issue on the first plea, denying the bill to be an accommodation bill, and also on the last plea, without noticing the second. The jury found a verdict for the plaintiff for 30*l.*, and it was held, that as the material question for the jury was, whether any thing remained due to the plaintiff from the defendant, the judgment could not be arrested on the ground of any discontinuance on the record, by not answering the second plea: and that though a nolle prosequi should regularly have been entered before the trial, that might be done before entering up final judgment. *Fallows* v. *Bird*, T. 1835. 836

DISHONOUR OF BILL, 277.

DISTRESS.

On any goods found on demised premises. 410

See LANDLORD AND TENANT.

Contract by landlord not to distrain. 409

See *Neale* v. *M'Kenzie*. 1106

DISTRINGAS.

Appearance after. 1093

See APPEARANCE—PRACTICE—WRITS.

DOGS.

Case for keeping dogs, well knowing them to be used to attack, chase, bite, worry, and kill cattle &c., and which bit, worried, and killed plaintiff's cattle. Plea: general issue:—Held, that this plea put in issue the scienter, being of the substance of it, and not mere inducement. *Thomas* v. *Morgan*, T. 1835. 1085

Proof that defendant's dogs were savage, and had bitten cattle of other persons besides the plaintiff, is not evidence that defendant knew they were accustomed to do so. *Ib.*

The defendant's saying, that if his dogs had bit the plaintiff's cattle he would pay the damage, was some evidence of the scienter, but so very slight, that though not left to the jury, the court refused to enter a verdict for the plaintiff upon it. *Ib.*

The savage acts of dogs are not

to be left to a jury as evidence of their owners' knowledge of their disposition. *Thomas* v. *Morgan*, T. 1835. 1085

EASEMENT.

The permanent easement of having a drain in another's land to convey water from a spring there situate, cannot be conferred without deed, and a parol licence to have such a drain may be revoked though it was made in consequence. *Cocker* v. *Cowper*, M. 1834. 103

Where a party became seised in fee of one set of premises, and possessed of a chattel interest in another, the owner of which latter had previously enjoyed an easement in the former, it was held, that such unity of possession of the land *a quâ* and *in quâ* the easement existed, would operate only to suspend, and not to extinguish the easement. *Thomas* v. *Thomas and Another*, E. 1835. 804

Semble, a party possessing an easement that the droppings from his wall shall fall on the land of another, does not lose it by heightening the wall or increasing the projection from which the water falls, unless injury accrues, or is increased by so doing. *Thomas* v. *Thomas and Another*, E. 1835. 804

Implied demise of, 503

Twenty years user of, under 3 & 4 *W*. 4. c. 71. *Monmouthshire Canal Company* v. *Harford and Others*, M. 1834. 68

EJECTMENT.

See Mesne Profits.

Where part of premises sought to be recovered in ejectment, consisted of three unfinished and uninhabited houses, the affixing declarations in ejectment on the doors of them is not good service, and the right course is to proceed on the vacant possession. *Doe on demise of Showell* v. *Roe*, E. 1835. 734

Twelve defendants in ejectment entered into a joint consent rule, without specifying the particular premises for which each respectively defended. At nisi prius the judge ordered that two of them be at liberty to withdraw their pleas and suffer judgment by default, and that the record should be amended by striking out their names; but did not order the consent rule to be altered or amended. The trial went on, the two defendants did not appear, and the judge refused to nonsuit for want of their appearing to confess lease, entry, and ouster; the other ten established a defence and had a verdict:—Held, that the consent rule was not virtually amended by the order; and that the plaintiff was therefore entitled to a general verdict against all the defendants, but subject to paying the ten defendants who went to trial the costs of their defence. *Doe* d. *Bishton* v. *Hughes and Others*, T. 1835. 957

ENJOYMENT.

Of easement for 20 years, under 2 & 3 *W*. 4. c. 71. See p. 68.

ENTRIES.

By deceased clerk. 458

ESTOPPEL. 846

EVICTION.

See *Neale* v. *M'Kenzie*. 1106

EVIDENCE.

In trespass brought by the lord of a manor for carrying away dollars claimed by him as wreck, two instruments dated in 1639 and 1657, and purporting to be presentments or answers of a jury, partly

consisting of tenants of the manor, to questions by commissioners of survey appointed by the then lord, were put in to prove the boundaries of the manor, and also the lord's title to wreck, which was affirmed in particular passages:—Held, that these were only evidence of the boundaries, and could not be admitted as declarations by the tenants of the manor of the title of the lord to wreck, that being a matter of private right derived from the crown, respecting which they could not be taken to have any peculiar knowledge, as they had no concern with it. *Talbot* v. *Lewis*, M. 1834. 1

Peacock having conveyed a close to *Simpson*, who built a house thereon, conveyed it again to *Pickering*, who pulled down the house, and then mortgaged the property to *Peacock* as a security for the purchase-money. *Simpson* having sued *Pickering* for trespass to the close, Held, that as only a possibility appeared that *Peacock* might be a party interested, he was a competent witness for the defendant. *Simpson* v. *Pickering and others*, M. 1834. 143

If a clerk make an entry charging himself, it is evidence against third persons after his death, even though it appears very probable that he had no personal knowledge of the facts alleged in the entry, but derived it from others. *Crease* v. *Barrett*, H. 1835. 458

An answer purporting to be made in 1570, by the conventionary tenants of a manor in *Cornwall* to interrogatories by the lord's agents which had been lost, and stating his rights as lord, *e. g.* to the tenth of certain tin for toll, is admissible in proof of a custom as evidence of reputation even against the free tenants of the manor; but not if it states facts only, as "that the commons of the manor belong to the tenants of the said manor, who have always enjoyed the same under the yearly rent of 33*s.* 4*d.*" *Ib.*

Reputation is admissible in evidence though unconfirmed by proof of corresponding facts. *Ib.*

When a judge at nisi prius offers to receive such of a certain set of documents as are evidence of reputation, having rejected others that stated particular facts only, a new trial will not be granted, if one of the latter kind is afterwards put in, and his attention be not called to its contents by objection made. *Ib.*

The declarations of a lord of a manor as to the boundaries of the manor, are evidence after his death, but not as to the extent of his rights over the wastes. *Ib.*

A lease for years of tin-mines and toll-tin, determinable on lives, was granted in 1797, and was surrendered in 1810. Another was then granted on paying a fine, part of which was paid for the surrender of the former lease. In 1798 the lessor executed a lease of the surface:—Held, that a recital in that lease was admissible in evidence against the lessee of the mines and toll in 1810; for he cannot claim by any title prior to that date. *Ib.*

Where evidence is rejected improperly, a new trial will be granted, unless it is quite clear that had the rejected evidence been admitted, a verdict, founded upon it, as well as on the rest of the proofs on the same side, would have been clearly and manifestly against the weight of evidence, and certainly set aside on motion as an improper verdict. *Ib.*

A., while solely possessed of certain iron works, sued certain parties for diverting water from them,

and obtained a verdict and judgment. He subsequently took into partnership *B.*, who had been examined as a witness at the trial. *A.* and *B.* afterwards sued the same defendants for a similar injury committed by them since the former trial. Held, that the verdict and judgment in the former cause were admissible in evidence against them, for *B.* was disinterested when he gave his testimony, and the primâ facie evidence abundantly showed the privity of estate between the present plaintiffs and *A.* *Blakemore and Booker* v. *Glamorganshire Canal Company*, E. 1835. 603

Conversation previous to letter, admitted as evidence of motive inducing to write it. 931

Contradicting written matters by parol. 239, and n. 243

Of assignment by party afterwards bankrupt. 309

Of assignment and proceedings in bankruptcy. See *Giles* v. *Smith*. 15

EXCESS.

See PLEADING.

EXCISE OFFICER.

See PARLIAMENT.

EXECUTION.

Writ of, binds property in goods from its delivery to sheriff. 97 n.

Set aside for irregularity is mere nullity. 147

Charging in. 1134

Concurrent fi. fa. and ca. sa. See 981

EXECUTORS.

See PLEADING.

T. W. demised premises to the defendant, subject to a covenant by him not to fell, stub up, lop or top the timber trees, excepted out of the demise; a breach of this covenant having been committed in his lifetime:—Held, that his executor could maintain covenant against the lessee. *Raymond and another, Executors of Walford*, v. *Fitch*, T. 1835. 985

Commencement of declaration by, *Hargreave* v. *Holden*. 202

Attachment by stamp office against. See ATTACHMENT.

EXECUTORS AND ADMINISTRATORS.

Executors declared in one count on a contract by the defendant with their testator, and in another on a contract by the defendant with them to pay money due to the plaintiffs as executors on an account stated between them, with a promise to pay them as executors, and a verdict was found for the defendant:—Held, that he was entitled to his costs of the last count under 23 *H.* 8. c. 15., and that the court has no power to interfere, under 3 & 4 *W.* 4. c. 42. s. 31. in favour of the plaintiffs as executors. *Ashton and Others, Executors*, v. *Pointer*, H. 1835. 322

See *Godson* v. *Freeman*, Tyr. & G.

EXIGENT.

Johnson v. *Budge*. 198

EXTENT.

Sale of land taken by. 895

EXTINGUISHMENT.

Of debt by taking bill. 719

Of easement. See *Thomas* v. *Thomas*.

EXTORTION.

See SHERIFF.

FEOFFMENT. 753

FERRY.

A public ferry is a public highway of a special description, and its

termini must be in places where the public have rights, as towns or vills, or highways leading to towns or vills. It would therefore be actionable to construct a new landing place at a short distance from one terminus of an ancient ferry, and to make a practice of ferrying passengers from the other terminus and landing them at the new place, from whence they pass to the same town or vill in which the ancient ferry is, or to the same public highway in which it is so established before it reaches any town or vill, and by which highway they go immediately to the first vill or town, and to all the other vills and towns to which it leads. But where there is a river or body of water passing by several towns or places, the existence of a franchise of an ancient ferry over it from point A. on one side, to point B. on the other, does not preclude the king's subjects from using the water as a public highway from or to all the other towns or places on its banks, or to oblige them on all occasions to pass from one terminus of the ferry to the other. *Huzzy* v. *Field*, T. 1835. 855

A person who kept a boat to ply for hire and ferry persons across *Milford Haven*, employed a servant to row the boat. This servant was proved to have taken a passenger on board in the usual manner, and to have carried him at his request from one terminus of an ancient ferry to a place within half a mile of the other terminus :—Held, that as the servant acted at the time in his ordinary course of employ by his master, the master would be answerable for his act, had it amounted to an infringement of the ancient ferry. *Ib.*

FINES AND FORFEITURES.

By charter of *Edw.* 4. all *penalties forfeited*, and to be forfeited, of all and every the barons and resiants in the port of *Dover* &c., in whatsoever courts of his majesty they should happen to be adjudged, were granted to the mayor and corporation of *Dover*. By a charter of *Car.* 2. all fines, *forfeitures* &c., arising in the said courts, were granted to the same body :—Held, that a recognizance entered into before a justice of peace of the town and port of *Dover*, conditioned to appear and answer an indictment at the sessions there, which was forfeited by the non-appearance of the party, did not pass to the mayor and corporation as a *forfeiture*. *The King* v. *The Mayor, Jurats, and Commonalty of the Town and Port of Dover, claiming certain Recognizances of* 300*l.*, 150*l.* *and* 150*l.*, H. 1835. 279

FIRE.

See Insurance.

FIXTURES.

Trover for by assignees of bankrupt. 309

FLOWERS.

What, within 7 & 8 *G.* 4. c. 29. 757

FORBEARANCE TO SUE. 701

FORD.

See *Phipson* v. *Harvett*. 61

FORFEITURES.

See Fines and Forfeitures.

FRAUDULENT PREFERENCE, 309

GAMING.

A declaration stated, that by the usage of racing it was regulated, that in all races to be run for, all stakes for sweepstakes should be made before the hour of starting for the first race of the day, in cash, bank bills, or banker's notes payable on demand, and be placed in the hands of the person appointed by the steward to receive the same, *and in default thereof by any person, he should pay the whole stake as a loser.* The declaration then stated, that it being so regulated, certain races were appointed to be run, and were run at *L.*, of which one *R. B.* was steward, and one *J. J.* clerk of the races, and that there were at the races certain produce stakes to be run for, and that a certain filly of the plaintiff, and a certain colt of the defendant, had been nominated for the stakes; that *by a regulation of the races at L., it was provided that all stakes &c. should be paid to the clerk of the races before eleven o'clock on the day of running, or the owner should not be entitled, though a winner.* Averment, that the plaintiff had, before the hour of starting, and before eleven o'clock on the day of running, made and paid his stake into the hands of the clerk of the races, that the defendant's colt ran and came in first, and, but for the defendant's default, would, according to the usage of racing, have been entitled to the sweepstakes, but that the defendant did not, before the hour of starting for the first race of the day, or before eleven o'clock on that day, being the day of running, make his stake, or pay the same into the hands of the clerk of the races. It then averred that the plaintiff's filly did run, and came in second only to the defendant's colt, whereby the plaintiff became liable to pay the whole of the stake, &c. *Lacey* v. *Umbers*, E. 1835. 742

Plea, that before the defendant had notice of the regulation of the races at *L.*, and before the hour of starting for the first race of the day, and before the running the race for the sweepstakes, the defendant was ready and willing, and offered to make his stake for his said colt for the said sweepstakes, in bankers' notes, payable on demand, and then tendered and offered to pay the said stakes in such bankers' notes into the hands of the said *J. J.*; but the said *R. B.* then refused to allow the said *J. J.* to accept or receive the said stake, or to allow the defendant's colt to run for the sweepstakes, on the ground that the colt was disqualified to run for the same, and that the said *J. J.* did, in pursuance of such refusal of the said *R. B.*, refuse to accept or receive from the defendant his stake, and to allow his colt to run for the said sweepstakes, on the ground and for the reason aforesaid, and on no other ground or reason whatsoever. *Ib.*

Replication, that the defendant did not tender or offer to make his stakes for the said colt for the said sweepstakes, or to pay the same into the hands of the said *J. J.* until long after eleven o'clock on the day of running for the said sweepstakes (although before and at that hour he had notice of the regulation of the said races at *L.*) *Ib.*

Held, on special demurrer, that the replication, if not a departure, was bad on general demurrer, for not showing a good cause of action; and that the error might be taken advantage of, though not set out in the margin of the demurrer book. *Ib.*

GUARANTIE.

The defendant sent to the plaintiffs the following letter signed by himself, but written by *B.*: "*F.* informs me that you are about publishing an arithmetic for him and another person, and I have no objection to being answerable as far as 50*l.* For my reference apply to *B.* & Co. of this place." *B.* attested defendant's signature thus: "Witness to *G. T.* (the defendant) *J. B.*" An action being brought on the guarantie, the plaintiffs did not prove that they gave the defendant notice that his guarantie was accepted, and that his solvency was deemed satisfactory: Held, that he could not recover. *Mozley and Others* v. *Tinkler*, H. 1835. 416

R. S. a builder, contracted to perform certain works for government, and having given a bond to the crown for the due performance of the work, applied to the plaintiff to supply him with bricks to carry on the works, which he did on the faith of the following guarantie, signed by the defendants as sureties. "Please to deliver to *R. S.* for the completion of his contract at *Deptford* and *Woolwich* yards, 500,000 of the best stock bricks, to be delivered at the said dock-yards at 32*s.* per thousand; and we, as his sureties, do hereby consent that the proper officer, *Navy Office, Somerset House*, who shall or may have the payment of the contract when finished, shall and may stop the amount of such account for bricks delivered; and we do hereby agree to become guarantees for the payment of the same to you when the amount of the contract is paid." After the bricks were delivered *R. S.* partially performed the work, and requiring an advance of money, applied to and received from the crown, with the plaintiff's consent, 300*l.* on account, and afterwards executed extra work, for which he was entitled to 284*l.* 5*s.*, but was subsequently dismissed by the crown for neglect, in having only partially executed his contract; other persons were employed at their own prices to complete it, and the crown paid for the work accordingly without the assent of either *R. S.* or the defendants. After the whole undertaking had been perfected, an arrangement took place between the crown and *M.*, one of the defendants, on behalf of himself and his co-surety and with the privity of *R. S.*, and an account was stated by the proper officer, between the crown and *R. S.*, in which *R. S.* was credited with the amount of the contract prices, and 284*l.* 5*s.*, for extras, and debited with the 300*l.* paid him and the sum paid to the persons employed to complete the contract, leaving a balance of 241*l.* 16*s.* 1*d.*, for which a bill was made out payable to *R. S.*, specifying it to be a balance upon a final settlement of all claims which he, or any one through him, might have on the public in respect of works undertaken and partly performed by him at *Woolwich* and *Deptford*. That bill was given to *M.*, who gave receipt in the terms of it.

Held, first, that under these circumstances the money paid by the crown to the persons who completed the works contracted to be performed by *R. S.*, was not money paid to *R. S.* or his agents, and that the whole contract money not having been paid to *R. S.* the plaintiff could not recover on the guarantie. *Hemming* v. *Trenery and Malim*, T. 1835. 887

Secondly, that even if that were otherwise, the plaintiff had no claim on the 300*l.* paid to *R. S.*, having expressly waived it by consenting to the payment. *Ib.*

Thirdly, that if the balance of 241*l.* was to be considered as part of the allowance for extra work done, the plaintiff could have no claim on that balance: and that if it was a sum partly composed of such extras and partly of money due for work done under the contract, the plaintiff could only be entitled to nomnal damages, as it was impossible to ascertain what sum was due to him on the latter account. *Ib.*

HEIRS.

"Next male heirs," means heirs male of body. 455

HERALD.

See ARREST.

HORSE RACE.

See GAMING.

HOUSE.

Disturbance of possession of. See *Timothy* v. *Simpson*. 244

HOUSES.

See TITHES.

HUSBANDRY.

See *Angerstein* v. *Handson*. 383

IMMEMORIALTY.

Jenkins v. *Harvey*. 514, 871

IMPARLANCES.

Put an end to by 2 *Will.* 4. c. 39., uniformity of process act. *Morse* v. *Geeting*, M. 1834. 179

IMPROVEMENT ACTS.

See *Phipson* v. *Harvett*. 54

INDORSEMENT.

See BILLS AND NOTES,

Of bill or note. A new drawing. 107

Consideration for. 1127

Property in bill by. 111

On capias.—See CAPIAS.

INQUIRY.

Evidence material for the defendant was improperly rejected on the execution of a writ of inquiry, and a new inquiry was ordered on that account. The defendant, however, to avoid the expense of a new inquiry, paid the amount already assessed by the jury:—Held, that he was not bound to pay the plaintiff the costs of the inquiry. *Porter* v. *Cooper*, E. 1835. 798

INSOLVENT.

A trader in insolvent circumstances, and in prison, negotiated with his creditors for his discharge; they proposed that he should execute a composition deed, assigning all his effects to one of them, in trust, for the benefit of the creditors. He refused, but afterwards saw a letter written by an agent of their's to a third person, saying that they could not consent to the debtor's discharge, and that he must either execute an assignment, or be made a bankrupt. Three days after reading this letter, the insolvent, with great reluctance, executed the assignment to the party selected by the creditors:—Held, that this was not a void conveyance, as "voluntary" made under s. 32 of the insolvent act, 7 *Geo.* 4. c. 57., and that the assignee appointed by the insolvent court could not sue the trus-

tee for the proceeds of the insolvent's goods as for money had and received to his use. *Davies, assignee of Watts, an insolvent debtor*, v. *Acocks*, T. 1835. 963

An assignment by a debtor in insolvent circumstances and in prison, but before petitioning for his discharge under the insolvent act, by which he conveyed all his property to a trustee for the benefit of all his creditors, is not void within 7 *G.* 4. c. 57. s. 32., as a voluntary assignment. Per Lord *Abinger* C. B. and *Bolland* B. and *semb.* per *Alderson* and *Gurney* Bs. *Ib.*

INSURANCE.

A policy of insurance on a ship, contained a memorandum in the margin, that the said ship was "warranted not to sail for *British North America* after 15th *August* 1831." On that day she was in dock at *Dublin* ready for sea, and having cleared for *Quebec*, was hauled out of dock into the *Liffey*, as early in the afternoon as the tide permitted. The wind blowing strong and directly up the river, she could not set a sail, but was warped down about half a mile, when the tide falling she took the ground. She was warped a little further next day, took the ground again when the tide fell, being still ten miles from the harbour's mouth. On the 17th, the wind having changed, she set her sails and got to sea, but was lost on the voyage. The jury found that the master and crew, by hauling out of dock and warping down the river on the 15th, intended to put themselves in a more favourable situation for prosecuting the voyage from *Dublin* to *British North America*, and not merely to fulfil the warranty, but that, at the same time, when the vessel quitted the dock they knew it was impossible to get to sea that day. Held, that the ship was, on the 15th *August*, in prosecution of the voyage assured; and, therefore, that the warranty was satisfied, and the policy available. *Fisher* v. *Cochran, administratrix*, (In Error.) H. 1835. 496

The defendants insured against fire certain cotton-mills, millwright's work, including standing and going gear therein, with engine-house adjoining, and the steam-engine therein. The policy recited, that the buildings were brick built and slated, warmed exclusively by steam, lighted by gas, &c. worked by the steam-engine above mentioned, in the tenure of one firm only, standing apart from all other mills, and worked *by day only*. The mills &c. were consumed by fire, and the insured sued on the policy. Held, that these words referred not to the steam-engine, or any part of the gear, but to the mill only: so that shafts which passed through the cotton-mill might be kept turning and moving by the steam-engine by night, to keep other mills going, so long as the insured cotton-mill was not worked, except by day. *Whitehead* v. *Price and Others*, E. 1835. 825

By a condition of the policy it was stipulated, that every insurance attended with particular circumstances of risk, arising from the situation or construction of the premises, or the nature of the trade carried on, was to be specially mentioned in the order given for the policy, so that the risk might be fairly understood; and that if not so expressed, or if any misrepresentation should be given &c., or if after the effecting the insurance the risk should be

increased by carrying on any "hazardous trade, operation, or process, or hazardous communication," the insured would not be entitled to any benefit under the policy. To an action on the policy it was pleaded, "that after the making the policy, the steam-engine therein mentioned was worked by night, and not by day only, whereby the risk in the said policy was increased:" — Held, that the plaintiff would be entitled to judgment, were a verdict entered on the plea, it being bad for not averring that particular circumstances of risk existed, which were not expressed in the order given for the policy, or were misrepresented, or that after the assurance had been completed an alteration had been made by which the risk was increased, or that a hazardous trade, operation, process, or communication was carried on which was not carried on when the policy was effected. *Ib.*

INTEREST.

How to direct levy of, by ca. sa. *Williams* v. *Waring*. 1134
On bond. 639

INTERROGATORIES. 458

IRREGULARITY.

Where serviceable process was issued against two, but the declaration was against one only, the proceedings are regular. *Caldwell and Another* v. *Blake*, E. 1835. 618

ISSUE.

The form of issue directed by *Reg. Gen. Hil.* 4 *Will.* 4. Form No. 1., should contain the dates of the pleadings, but not the form of action. *Ball* v. *Hamlet*, M. 1834. 201

JUDGE.

At chambers. 917. 919

JUDGE'S ORDER.

See ARBITRATION.

A recital of facts in a judge's order is not evidence of them, so as to admit the truth of them on a demurrer to a pleading in which the order is set out. *M'Cormick* v. *Melton*, M. 1834. 147

A party being arrested gave a bail-bond, but in consequence of his not perfecting special bail, the sheriff was fixed. The plaintiff having sued on the bail-bond, a summons was taken out on behalf of the bail, and a judge ordered the proceedings to be staid, on payment of debt and costs to the attorney for the original plaintiffs, by the attornies of the original defendant, who had in the meantime become bankrupt, but had, before his bankruptcy, supplied them with a sum of money towards paying this debt and costs; the money having been paid over accordingly, held, that this payment under the judge's order was payment under process of law, and that *A.*'s assignees could not recover it from the original plaintiffs, to whom it was so paid. *Semble*, their remedy was against the bankrupt's attornies, who paid over the money after the bankruptcy. *Belcher and Others, Assignees of Evans, a bankrupt*, v. *Mills and Another*, E. 1835. 715

The plaintiff being arrested by the defendant, during privilege, was discharged by a judge's order, on condition that if the defendant paid all the costs the plaintiff had been put to, as the same should be taxed by the master, he should not bring an action for the arrest. The costs were taxed and the amount paid to the plaintiff, but

a review of the taxation being ordered, further costs were allowed him, which the defendant refused to pay. The plaintiff then sued the defendant in assumpsit on an agreement to pay the costs, in consideration that the plaintiff would relinquish all right of action against him for the improper arrest:—Held, that the action would not lie on the judge's order or rule of court for payment of costs, no agreement appearing to have been entered into by the defendant to pay the taxed costs at all events. *King* v. *Taylor*, E. 1835. 800

A judge at chambers may order an attorney in a cause to pay a sum for costs, and such order will be made a rule of court in the first instance on motion, without rule nisi. *Wilson* v. *Northop*, T. 1835. 1102

Need not be stated in writ. 198

Effect of. 510

JUDGE'S WARRANT.

See CONSTABLE.

JUDGMENT.

Not satisfied by taking defendant on final process, if set aside for irregularity. 147

JUDGMENT AS IN CASE OF NONSUIT.

Where in a country cause issue was joined in the vacation preceding an issuable term, and no notice of trial was given for the next assizes, judgment as in case of nonsuit may now be moved for in the term next after those assizes. *Williams* v. *Edwards*, M. 1834. 177

It is not sufficient cause to show against judgment as in case of nonsuit, that the plaintiff, from poverty, has neglected to furnish his attorney with money to carry on the suit. *Cleasby* v. *Poole*, M. 1834. 146

Time for moving for, after writ of trial executed before sheriff. See WRIT OF TRIAL.

Where in ejectment a party defends as landlord, and the tenants in possession give up possession to the agents of the lessor of plaintiff, that is not ground for discharging a rule for judgment as in case of nonsuit, except on a peremptory undertaking. *Doe* d. *Draycott* v. *Dyos*, E. 1835. 735

Where in a country cause issue is joined in vacation, and notice of trial given for a particular day in the next term before the sheriff, but the plaintiff does not proceed to try pursuant to such notice, it is premature to move for judgment as in case of a nonsuit in that term. *Linley* v. *Poulden and Another*, E. 1835. 818

So, *semble*, in town causes. *Semble*, that costs of the day for not proceeding to trial might be moved for in the same term, if notice of trial was not countermanded in time. (See *Reg. Gen.* of the court of Exchequer, *E.* 1824, and *Reg. Gen.* of all the courts, *H.* 2 *Will.* 4. No. 70.)

JUSTICES OF PEACE.

In actions against justices the "place of abode" of the plaintiff's attorney required by 24 *G.* 2. c. 44. s. 1., to be indorsed on the notice of action, is sufficiently described by stating his place of business, though he in fact sleeps and resides elsewhere. *Roberts* v. *Williams and Another*, E. 1835. 583

KING'S CHAPLAIN, 353

KING'S WAREHOUSE.

See CUSTOMS—LAW.

Is a warehouse within smuggling act. *Lowe* v. *Attorney-General.* 211
Attorney-General v. *Vondiere.* 206

LANDLORD AND TENANT.

The plaintiff being seised in fee of certain houses and premises, with a yard and passage adjoining to each of them, demised them by parol to several tenants, who passed over the yard and passage, and used a privy and pump there in common. The plaintiff repaired the pump, but it did not appear whether the yard and passage were demised by him or not. The defendant being tenant for a long term in other premises of the plaintiff which also adjoined the yard and passage, the plaintiff brought trespass against him for breaking and entering the same. Held, that the question for the jury was not whether the plaintiff had reserved the yard and passage to himself, but whether he had ever demised it so as to part with his possession of it. *Hebbert* v. *Thomas and Another*, H. 1835. 503
See CUSTOM OF COUNTRY.

Lands were let for a year certain, and then from year to year, so long as the parties should think proper, with power to determine the lease on giving notice to quit. The lease also contained various terms as to repairing and cultivation. The tenant occupied under the lease and died: his executors entered on the demised premises, and continued to occupy them, paying rent for several years. Held, that they were personally liable for breaches of the stipulations to repair and cultivate contained in the original lease, and were properly sued in assumpsit, on an implied promise to perform them, founded on the consideration of their continuing to occupy, and the lessor's abstaining from giving notice to quit. *Buckworth* v. *Simpson and Another*, H. 1835. 344

N. accepts a lease from *M.* of 100 acres of land for one year, and enters on it. On his entry he finds eight acres in possession of *C.*, who is entitled under a prior lease from the same lessor, and keeps possession of the eight acres till half a year's rent is due from *N.* on the lease. *N.* has possession of the remaining 92 acres during all that time, but is excluded from that of the eight. Held, that this was not such a case of tortious eviction by the landlord *M.*, as would entirely suspend the rent, but that it was apportioned only, so that the landlord could distrain for the apportioned rent of the 92 acres. *Neale* v. *Mackenzie*, E. 1835. 1106
But see *S. C.* in Error, E. 1836, Tyr. & Gr. Judgment reversed.

Power to re-enter on bankruptcy of tenant's executor. 125

Consent of landlord to change of tenancy. 736

The tenant of a farm being in arrear to his landlord at *Michaelmas* 1833, executed in *November*, to a creditor, a bill of sale of all his distrainable property, and also of certain grass or eddish growing on the farm. Just before the sale the landlord distrained, but his agent appeared at the sale, and suffered it to proceed, on the terms of paying to the landlord, in discharge of the rent due, the proceeds as well of the eddish, as of the other effects. The eddish being put up for sale as to be depastured till the 5th *April* next, he interposed, saying—"No, only till 25th *March*." The eddish was sold to the plaintiff, who put in his cattle to consume it, but the produce of the sale having left

40*l.* rent in arrear, the landlord distrained them there in *February*: —Held, *Parke* B. dissentiente, that, under the circumstances, a contract must be presumed by the landlord not to distrain the cattle thus put on the close to consume the eddish. *Horsford* v. *Webster and Deacon*, H. 1835. 409

LEASE.

The assignee of a lease is liable for breach of a covenant to repair, committed during his own possession, though he may have assigned the premises before the action was commenced. *Harley* v. *King*, E. 1835. 692

LEGACY DUTY. 431

LETTER. 417 n.

LIBEL.

Case for a libel in a newspaper; plea, not guilty. The alleged libel purported to be a report of the trial of an action brought by the same plaintiff against other defendants who had justified; and, after recounting the libel in that action, the proofs in support of the plea, and the summing up of the judge, closed by stating that the jury found a verdict for the plaintiff, with 30*l.* damages. It did not appear whether any such trial had, in fact, taken place, or whether, assuming a trial to have been had, the report was or was not an impartial one. The jury were directed, that if, in their opinion, the report taken altogether indicated a malicious motive, actuating the defendants against the plaintiff, or was injurious to his character by mis-statement, or insinuating his being guilty of the matter originally imputed, notwithstanding he was stated to have obtained damages for that imputation, or that the report of such a trial was pure fiction invented by the defendants, their verdict must be for the plaintiff; with the observation, that if they thought that, taking the report altogether, the allegations contained in it to the plaintiff's prejudice were repelled by the verdict which he was stated to have obtained, so as not to be on the face of it injurious to him in the result, they ought to find for the defendants. The jury having found for the defendants, the court refused to disturb the verdict. *Chalmers* v. *Payne and Another*, E. 1835. 766

See PLEADING.

LICENCE.

To have easement in another's land. 103

LIMITATIONS, STATUTE OF.

The plaintiff occupied land under the defendant at a yearly rent, and at the defendant's request became his farming bailiff in the place of another person who had received 12*s.* a-week while so employed. The plaintiff continued in the service nearly 13 years without receiving wages or paying rent, and then sued for the balance of his wages for all that time, after deducting the rent: Held, that though this might be such an open account as would have taken the case out of the statute of limitations, 21 *Jac.* 1. c. 16. s. 3., yet that since 9 *Geo.* 4. c. 14. s. 1., he was only entitled to recover wages for six years, there being no part payment proved, or any thing equivalent to it or to satisfaction by agreement between the parties. *Williams* v. *Griffiths*, E. 1835. 748

LIMITATIONS.

Writ issued to avoid effect of, need not, since 2 & 3 *Will.* 4. c. 39. s. 10., be served or endeavoured to be served: it is sufficient to return it non est inventus, and enter it of record. *Williams* v. *Roberts*, H. 1835. 421

If the holder of a bill agrees with the party liable to pay it, that the latter shall supply the holder and his family with hats till he can pay the bill, and that the hats should be paid on account, and the hats are delivered and received accordingly between the parties, that transaction will be part payment within the exception of 9 *G.* 4. c. 14. so as to take the case out of the statute of limitations, 21 *Jac.* 1. c. 16. *Hart* v. *Nash*, T. 1835. 955

LIVERY OF SEISIN. 753

LONDON COURTS OF REQUESTS ACT. 796

LONDON.

Payments in lieu of tithes in. 432

LUNATIC.

A lunatic may be brought up by habeas corpus ad testificandum, on affidavit that he is not a dangerous lunatic, and is in a fit state to be brought up. *Fennell* v. *Tait*, M. 1834. 218

MALICIOUS TRESPASS, 293.

MANOR, 458.

MASTER AND SERVANT.

The plaintiff was hired by the defendant as head gardener to manage extensive hot-houses &c., at 100*l.* wages. He lived in a gate-house belonging to the defendant, within his domain, but 200 yards from his house. After the plaintiff had stayed four years, the defendant gave him a month's warning to quit. The plaintiff having sued for a quarter's wages:—Held, that he was a domestic servant within the custom of determining the yearly hiring of such servants by a month's warning or a month's wages, and that he was not entitled to more than the month's wages. *Nowlan* v. *Ablett*, E. 1835. 709

Custom of month's wages and month's warning. 714, n.

Semble, that custom will be recognized judicially without proof. *Ib.*

MAXIM.

Leges posteriores priores abrogant. 64

MEASURAGE.

See TOLLS.

MEMORANDA.

Of promotions, &c. 228, 229, 230, 513, 514.

MESNE PROFITS.

To make a judgment in ejectment conclusive evidence in an action for mesne profits, that the plaintiff had title from the day of the demise laid in the declaration, it must be placed on the record by way of estoppel. *Doe* v. *Huddart*, *Knt.* T. 1835. 846

Accordingly, where, to a declaration in trespass for mesne profits in the usual form, it was pleaded, that the premises mentioned in the declaration were not the premises of the plaintiff; it was held that the defendant might adduce proofs of title in himself, though he had not come in to defend the ejectment, and judgment had been signed against the casual ejector *Ib.*

After judgment by default in an ejectment against the casual ejector, the plaintiff, in an action for mesne profits, may recover the expenses

he has been necessarily put to in the ejectment, without confining them to costs between party and party. *Doe* v. *Huddart*, *Knt.* T. 1835. 846

METAGE.

See Toll.

MILLS, 862.

MISNOMER, 774.

MISTAKES.

In rules. See 487.

MONEY HAD AND RECEIVED.

Mrs. *W.* contracted with the defendant for the purchase of the goodwill and fixtures of a public-house for 120*l.*, of which 50*l.* was to be paid on a fixed day, if the defendant's landlord consented to the change of tenancy; and on payment of the remainder, the defendant was to give up possession to Mrs. *W.* The 50*l.* was paid, and the landlord gave the required consent verbally. Mrs. *W.* came with her furniture to the house, and carried on the business for some time, the defendant, however, still residing there. Before the remaining 70*l.* was paid, and before exclusive possession was given to the defendant, the landlord withdrew his consent:—Held, that the contract being conditional, on the obtaining his consent, and no change of tenancy having taken place before he withdrew it, it must be considered as never having been given; so that the condition not having been performed, the 50*l.* had been paid to the defendant on a consideration which had failed, and might be recovered from him as for so much money had and received. *Wright* v. *Newton*, E. 1835. 736

Election between, and trover. 155

MORTGAGE.

By trader. See Bankrupt.

MUTUAL PROMISES.

Accepting in satisfaction of debt. *Cooper* v. *Phillips*, 166.

See Agreement.

NEGLIGENCE.

The defendant being employed by the plaintiff to sell furniture for ready money only, sold it, but took in payment a bill of exchange drawn by the purchaser on a third person. The plaintiff refused to take the bill, and applied for the proceeds of the sale, but his agent afterwards obtained the bill from the defendant to get it discounted. It was never presented for payment; the drawer never had notice of its dishonour, and ten days elapsed after it became due, before the defendant had such notice:—Held, that the defendant was liable in an action brought against him for negligence in selling otherwise than for ready money, notwithstanding the plaintiff had not presented the bill for payment, and, by not giving notice of dishonour to the drawer, had discharged him from liability on the bill. *Semble*, that the defendant might sustain a cross-action against the plaintiff to recover any damage sustained by him, in consequence of such negligence preventing him from recovering on the bill. *Earl of Ferrers* v. *Robins*, E. 1835. 705

NEMO DEBET.

Bis vexari, &c. 719

NEW TRIAL.

After a plaintiff had obtained a verdict for damages in an action for words, imputing bullock stealing to him, he was convicted and attainted of that same offence so im-

puted. The court refused to stay the proceedings or grant a new trial on that account, particularly as the defendant was prosecutor, and a witness on the criminal trial. *Symons* v. *Blake*, T. 1835. 840

A defendant will be relieved from a verdict against him, if proper cause for so doing exists as between him and the plaintiff, though the plaintiff's attorney may thereby lose his lien on the judgment for his costs. *Ib.*

When refused, though evidence improperly rejected at trial. See *Crease* v. *Barrett*, 458.

In C. P. at *Lancaster*. 239

After trial before sheriff. See WRIT OF TRIAL.

NOTICE.

Of accepting guarantie, goods, &c. 410—420

To produce notice of dishonour. See *Swaine* v. *Lewis*, 998.

NOTICE OF ACTION.

To commissioners acting under local act. 476

To justices. 583

Under local act. 316

NOT GUILTY.

Pleading under statute, so as to give special matter in evidence. 727

NOTICE OF TRIAL.

See PRACTICE.

OUTLAWRY.

It is too late to object to the indorsement on a capias, for variance from the form given by the uniformity of process act, 2 *W.* 4. c. 39. Sched. No. 4. where the writ might have been seen at the filacer's office on 4th *June*, but no application was made till late in *Michaelmas* term to set aside an outlawry to which the plaintiff had proceeded in the meantime, notwithstanding the defendant swore that the outlawry was not known till six weeks before; for the irregularity in the writ, if any, should have been previously objected to on summons at chambers. *Lewis* v. *Davis*, M. 1834. 198

A writ, issued on 17th *April*, was returned non est inventus on 4th *June*, without a judge's order authorizing the sheriff to make such a return before the four months expired:—Held, that as the judge's order need not be stated in the writ, it must be assumed that the return was regularly obtained. *Ib.*

An exigent is not a "writ" within 2 *W.* 4. c. 39. s. 12. Per *Parke* B. *Ib.*

Where an exigent directed one of the proclamations to be made at the parish church of the parish in which the defendant resided:—Held, that the 31 *Eliz.* c. 3. s. 1. directs no particular form for the writ of exigent, and as it was not sworn that there was any nearer church or chapel than the parish church, the exigent was sufficient, though it did not state that the parish church was the nearest to the defendant's residence. *Ib.*

A man having a house and office may describe himself *of* the office. Per Lord *Lyndhurst* C. B. *Ib.*

OFFICE.

Distinguished from employment. 367

See *Jones* v. *Waters*, *Jenkins* v. *Harvey*, 514, 871.

PALACE COURT.

A defendant was sued, first, in the palace court, and afterwards in the Exchequer, and gave bail in both. The first cause having been removed into the King's Bench by habeas corpus, was remanded to

the palace court by procedendo, and interlocutory judgment was signed, and a writ of inquiry executed there; upon which the defendant was rendered by his bail to the prison of that court, the marshalsea. His bail in the other action in the Exchequer then issued a habeas corpus cum causâ out of that court, and got a rule to show cause why it should not be duly returned and filed, in order to enable them, by so removing his body with the cause into this court, to render him there in their discharge:—Held, that since 21 *Jac.* 1. c. 23. s. 3. this court had no power to remove a cause out of the palace court after interlocutory judgment there, except by writ of error; but fourteen days' time was given to the bail to render the defendant in this court after his custody in the palace court should expire. *Lawes* v. *Hutchinson*, H. 1835. (See 2 Ad. & Ell.) 236

PARLIAMENT.

Writ for election to. 1000

In a *qui tam* action brought under 7 & 8 *G.* 4. c. 53. s. 9. to recover penalties against the defendant for voting at an election for members of parliament, being an officer of excise; the proof was, that at the time of voting the defendant kept an inn, over the door of which the words "Excise Office" were painted in large letters. That at the previous registration of voters, his name was objected to, and on being called on to produce his commission, he produced to the revising barrister "something framed and glazed like a picture;" that it had been once seen by a witness, was partly written and partly printed, and authorized the defendant to collect duties of excise. That he had received entries of buildings, &c. as required by the excise laws before the passing 4 & 5 *W.* 4. c. 51., but after receiving notice of that act, ceased to do so:—Held, that this was not sufficient evidence for a jury, that at the time of voting, which was after the passing of 4 & 5 *W.* 4. c. 51. he was an "officer of excise," within the meaning of 7 & 8 *G.* 4. c. 53. s. 9. *Gooday* v. *Clark*, T. 1835. 1000

Whether since 4 & 5 *W.* 4. c. 51. the keeper of an excise-office is such an officer of excise within the meaning of 7 & 8 *G.* 4. c. 53. s. 9. as will be liable to penalties for voting at an election of a member of parliament. *Quære. Semble*, that he is not. *Ib.*

PARTNERS.

See SEAMEN.

(*Brown*) being patentee of an engine, (*Broadhurst*) bought a licence of him to erect it in *Cornwall* only. *Ridgway*, by agency of *Brown*, contracted with "*Brown* & Co." to erect such an engine in *Cambridgeshire*, *Brown* telling *Ridgway* that *Philip* and *Broadhurst* were his partners. During the building of the *Cambridgeshire* engine, *Broadhurst* frequently came to inquire how it went on, and when it would be finished. After the engine had failed in its object, *Ridgway*, previous to suing *Philip* and *Broadhurst*, inquired from *Broadhurst* if *Brown* had been correct in declaring that *Broadhurst* and *Philip* were his partners; to which he answered that he had. He then sued *Philip* and *Broadhurst*. The jury having found a verdict for the defendants, on the ground that *Broadhurst* was not a partner, the court refused to set it aside, and grant a new trial. *Ridgway* v. *Philip and Broadhurst*, M. 1834. 131

PART-PAYMENT.

See LIMITATIONS.

PARTICULARS OF DEMAND.

In trespass to rail-roads. 68
Annexed to record. 356

PARTNERSHIP.

One partner cannot bind another by submitting a partnership matter to arbitration, without express or implied authority for that purpose. *Adams* v. *Bankart and Another*, H. 1835. 425

PARTY-WALL.

In trespass for heightening the plaintiff's wall, whereby his lights were obstructed, the defendant pleaded the general issue, and at the trial proved the wall to be a party fence wall within the building act 14 *G.* 3. c. 78. s. 43., and that he had built on it in compliance with that act. The plaintiff was nonsuited for not having given the defendant 21 days' notice of action, as required by s. 100 of the act:—Held, first, that the evidence was rightly received on the general issue, pursuant to 3 & 4 *W.* 4. c. 42. s. 1.; and, secondly, that the nonsuit was right, as the acts complained of were not shown to have been done by the defendant in otherwise than in pursuance of the building act in a bonâ fide manner, and were therefore "things done in pursuance of" that act, within s. 100. *Wells* v. *Ody*, E. 1835. 725

Held, also, that treble costs might be taxed to the defendant upon signing the ordinary judgment of nonsuit, without entering a suggestion on the roll for treble costs, and it is sufficient to enter it at any time before the roll is carried in. *Ib.*

PATENT.

A patentee summed up his invention thus: "My invention is the application of a self-adjusting leverage to the back and seat of a chair, whereby the weight on the seat acts as a counterbalance to the pressure against the back of such chair, as above described:"—Held, that the patent was valid; for without assuming to appropriate the principle of the lever, it claimed the invention of means by which that principle was applied to a chair in a new manner. *Minter* v. *Wells and Another*, M. 1834. 163

A patent recited in its title that the patentee was the first and true inventor of certain improvements in *extracting* sugar and syrups from cane-juice and other substances containing sugar, and in refining sugar and syrups. The specification stated a method of depriving syrups of every description of colour, by filtering them through charcoal produced by the distillation of bituminous schistus and used alone, or mixed with animal charcoal, or even through animal charcoal alone, when placed in thick beds. In an action for infringing the patent, it was pleaded, that the patentee did not, by any instrument in writing, particularly describe and ascertain the nature of his invention, and in what manner the same was to be and might be performed. On allegation that the title had claimed a larger invention than was disclosed by the specification; it was held, first, that the specification sufficiently described both branches of the invention recited in the title of the patent, viz. the refining sugar by melting it after it had granulated, and applying the patent process to it after having thus brought it into the state of syrup; and also to extract syrup from the

cane-juice before it had been so far subjected to the action of fire as to granulate and become sugar: and secondly, that the word 'improvements' being in the plural was of no consequence, as every part of the process might be treated as an improvement. It appeared that iron was combined with the bituminous schistus found in this country, and it was doubtful whether the charcoal produced by the schistus was not only disadvantageous, but injurious to the matter going through the process. The charcoal sworn to have answered the purpose of the patent was received from the plaintiff at *Paris*, where it had been made, and was declared by him to be the residuum of bituminous schistus from which the iron had been extracted. But no means existed of ascertaining in this country, of what substance it actually was the residuum, nor did the specification mention any process for extracting the iron from bituminous schistus: —Held, that whether the latter omission avoided the patent or not, the patentee ought to prove, either that the presence of iron in the bituminous schistus used in the process of filtering, was not absolutely disadvantageous to the matter going through that process, or that the method of extracting the iron from it was so simple and known, that a person practically acquainted with the subject could accomplish it with ease, or that bituminous schistus, as known in *England*, could be used in this process with advantage; and a verdict having been found for the plaintiff, the court set it aside on terms, and granted a new trial. *De Rosne* v. *Fairrie and Others*, H. 1835. 393

PAYMENT.

Malt was sold by defendant to plaintiff, by a measure called a *kobbett*, being a measure established by local custom, without specifying the proportion which that measure bore to the standard, as directed by 5 *Geo.* 4. c. 74. s. 15. The parties afterwards settled their accounts, and, inter alia, as to the malt. Held, in an action by the plaintiff against the defendant for wages, the defendant might prove that settlement of accounts as a payment of the plaintiff's demand. *Owens* v. *Denton*, H. 1835. 359

In lieu of tithes from time immemorial. 432

At a particular place and time. 1097

Plea of. See *Ansell* v. *Smith*. 141

See PLEADING.

PAYMENT INTO COURT.

Assumpsit for 30*l.*, the balance of an account of 40*l.* Pleas, first, to the whole declaration, payment of 27*l.* 4*s.* 4*d.* into court, and averring that the plaintiff had sustained damages to a greater amount; secondly, non assumpsit, except as to 27*l.* 4*s.* 4*d.*; thirdly, payment of 10*l.* before action brought; and fourthly, a set-off as to all except 27*l.* 4*s.* 4*d.* The plaintiff replied under No. 19 of *Reg. Gen. Hil.* 4 *W.* 4. that he accepted the money paid into court, and was satisfied. The defendant signed judgment of non-pros, on the ground that the plaintiff had not replied to the other pleas:—Held, that the judgment was irregular, as there were inconsistent pleas on the record, though the replication applied to one only. *Coates* v. *Stevens*, E. 1835. 764

Plea of, where count on bill. 524

Conclusion of plea of. 645

Taking plea of distributively. 535

Plea of will not be sustained by evidence of set-off. 535

Order of pleading, with other pleas. 645

PERFORMANCE.

Averring. 673

PLEADING.

In assumpsit for goods sold, defendant pleaded non-assumpsit to all except 20*l.* 9*s.*, and as to that sum that defendant being in bad circumstances and indebted to plaintiff in that sum, and to other persons respectively in large sums, and unable to pay those debts in full, the plaintiff and the said other creditors mutually agreed with each other and the defendant to take 5*s.* in the pound, as a composition on and in full satisfaction and discharge of their respective debts, and that the defendant was ready and willing to pay 5*l.* 2*s.* 3*d.* the amount of the composition, but that plaintiff refused to receive it, and discharged defendant from tendering and paying it:—Held, on demurrer, that as the plea was pleaded to the whole 20*l.* 9*s.* it was bad; for it afforded no answer as to the 5*l.* 2*s.* 3*d.*, which it did not show to have been paid, or tendered and paid into court, but merely stated that the plaintiff had discharged the defendant from tendering or paying it to him, without alleging any consideration for such discharge. *Cooper* v. *Phillips*, M. 1834. 166

Quære, whether the plea should not have stated the plaintiff's acceptance of the mutual promises in satisfaction of his debt? *Ib.*

Indebitatus assumpsit on promises to pay on request. Plea, as to part, that defendant has paid same, and in the same plea non-assumpsit to the residue; the whole concluding to the country. Held, on special demurrer, that the plea was bad, for not concluding with a verification. *Ansell* v. *Smith*, M. 1834. 141

Semble, the plea was double, and that its subject-matter should have been divided into two pleas; the first concluding with a verification, the last to the country. *Ib.*

In an action by indorsees against the acceptor of certain bills of exchange, defendant pleaded in one plea that the bills were accepted at the request of and for the accommodation of a third person, *D.*, and without consideration for the acceptance, and were indorsed to the plaintiffs after due; and in another plea, that before the indorsement *D.* was indebted to defendants, on the balance of an account, in a sum exceeding the amount of the bills:—Held, that the first plea was bad, for not stating that the bill was accepted before it was due; and that the parties had agreed that it should not be negociated after it was due; and that the last plea was bad, because a party to whom a note is indorsed subsequent to its becoming due must recover, notwithstanding any right of set-off possessed by the maker against the indorser arising from matters foreign to the note. *Stein and Another* v. *Yglesias and Others*, M. 1834. 172

Improperly inserting venue in the body of a pleading, contrary to *Reg. Gen. Hil.* 4 *W.* 4. No. 8. is not a ground of setting aside the declaration, but only of summons to strike out the surplusage. *Townsend* v. *Gurney*, M. 1834. 214

The form provided by *Reg. G. T.* 1 *W.* 4. and entitled "Common Counts," constitutes separate counts, as well for the purposes of pleading as of taxation of costs. (See *Reg. Gen. of Pleading, Hil.* 4 *W.* 4. No. 5.) *Jourdain* v. *Johnson*, E. 1835. 524

A declaration in assumpsit contained a count on a bill and the "common counts" provided by

Reg. Gen. Trin. 1 *W.* 4. claiming 100*l.* as due to plaintiff for money paid, 100*l.* for money lent, 100*l.* for goods sold, and 100*l.* on an account stated. Pleas; first, as to the *first* count and as to the 12*l.* 2*s.* parcel of the sum of 100*l.* in the *second* count of the declaration alleged to be due from defendant to plaintiff for goods sold, and as to the 100*l.* in the *second* count alleged to have been found due from defendant to plaintiff on an account stated, that the plaintiff paid into court 51*l.* 9*s.* 7*d.*, and that the plaintiff hath not sustained damages to a greater amount than that sum in respect of *so much* of the causes of action in the declaration mentioned, as were before specified in the plea. There was a second plea of non-assumpsit as to the residue. *Jourdain* v. *Johnson*, E. 1835. 524

Quære, if the special plea was bad on special demurrer, for not showing distinctly, what part of the 51*l.* 9*s.* 7*d.* paid into court was to be applied to satisfy the bill of exchange? *Ib.* See 535.

Where several matters are alleged in a declaration as a consideration for the defendant's promise, one of which is nugatory, yet if the rest afford a sufficient consideration, the promise laid will be supported. *King and Others, executors of King deceased*, v. *Matthew Sears*, E. 1835. 587

In cases of past or executed considerations, it is necessary to state that the consideration laid for the defendant's promise moved from the plaintiff, "at the special instance and request of the defendant;" but not in assumpsit on an executory consideration. *Ib.*

Indebitatus assumpsit for 100*l.* had and received, and for 100*l.* on an account stated. Pleas: "as to 25*l.*, parcel of the monies mentioned in the declaration, that the plaintiff ought not further to maintain his action, because the defendant brings into court here the said sum of 25*l.* ready to be paid to the plaintiff: and further saith that the plaintiff has not sustained damage to a greater amount than 25*l.* in respect of the causes of action in the declaration mentioned, *as to the sum* of 25*l.*: concluding with a verification, but without a prayer of judgment as to the further maintenance of the action. Non assumpsit to the rest of the pleas. Special demurrer to the first plea: Held, that it was bad, for not concluding with such prayer of judgment in the form provided by the general rules of pleading, *Hil.* 4 *W.* 4. s. 17. *Sherman* v. *Stevenson*, E. 1835. 645

Where a plea of payment of money into court is pleaded with other pleas, it should be pleaded last, and to the residue of the causes of action not before answered. *Ib.*

Since the new rules of pleading in case, *Hil.* 4 *W.* 4. No. IV., the defendant in trover, by pleading not guilty singly, admits that the plaintiff has some property in the goods as between him and the defendant, upon which he would be able to recover against the defendant: but will not be thereby prevented from proving that he is tenant in common with the plaintiff. *Stancliffe* v. *Hardwick*, E. 1835. 551

But where there has been an actual conversion, as by seizure, sale, and application of the proceeds, the defendant must, in order to justify such conversion in fact, as tenant in common with the plaintiff, plead that fact specially in confession and avoidance. *Ib.*

Since the new rules of pleading the conversion which is put in

issue is not a wrongful conversion merely, but a conversion in fact; so that if such actual conversion is insisted on as lawful, the defendant must confess and avoid it in a special plea, setting forth the title in right of which he justifies the conversion. *Ib.*

Quære, whether a defendant, who has not converted the goods in fact, but has merely refused to deliver them upon demand, must plead a right of lien specially? *Ib.*

See *Farrar* v. *Beswick*, T. 1836, Tyr. & Gr. R.

A declaration in trespass for assault and false imprisonment, contained only one count. Justification, that the plaintiff was apprehended on a charge of felony, and that because he had resisted and beat the defendant, the defendant a little beat and assaulted him. Replication, de injuriâ. The defendant proved that the plaintiff was apprehended on a charge of felony, but did not go on to prove that he resisted, and that the defendant assaulted him in consequence. Verdict for the defendant; and the court refused to set it aside, for only one assault could be given in evidence on one count; and that assault having been covered by that part of the plea which stated the occasion of apprehending the plaintiff, the defendant was not obliged to prove any other part of his plea. *Atkinson* v. *Warne*, H. 1835. 481

In assumpsit by the payee of a promissory note against the maker, a plea that it was made by the defendant "*without* any value or consideration whatever for his so doing, or for his paying the amount thereof, or any part thereof," was held bad on special demurrer, for not stating in the affirmative the facts which showed the want of consideration. *Stoughton* v. *The Earl of Kilmorey*, E. 1835. 568

The court only allowed an amendment on the terms of filing an affidavit of the truth of the matters pleaded. *Stoughton* v. *The Earl of Kilmorey*, E. 1835. 568

The new rule on pleading in assumpsit, *Hil.* 4 *W.* 4. I. s. 3. [*ante*, Vol. IV. xv.] provides that matters in confession and avoidance, *ex. gr.* illegality of consideration, drawing, indorsing, or accepting bills or notes by way of accommodation, shall be specially pleaded: Held, in an action on a promissory note, that a plea that "no consideration was given" for it, throws on the defendant the onus of affirmative proof that the note was without consideration, notwithstanding the plaintiff was obliged by the plea to allege the affirmative in his replication. *Lacey* v. *Forrester*, E. 1835. 567

Where there is a special contract for goods to be furnished, or work to be done, at a fixed price, and the declaration consists of the common counts in debt on simple contract, for goods sold and delivered, and for work and labour; to which the defendant pleads that he never was indebted, he may prove, as well since the new rules of pleading, *Hil.* 4 *W.* 4., Nos. I. & II., as before, that the goods delivered were not of the quality contracted for, or that the work was done in an improper manner. *Cousens* v. *Paddon*, H. 1835. 535

In order to entitle the defendant to a verdict on an entire plea of payment to an indebitatus count in debt on simple contract, payment of the sum specified in the plea, though laid under a *videlicet*, must be proved. But the plea may be taken distributively, so as to find the issue for the defendant as to the sum, whatever it may be, that is proved to have been paid, and for the plaintiff as to the rest. See *Jourdain* v. *Johnson*, 524.

The like law seems to apply to the plea of set-off. See *Jourdain* v. *Johnson*, 524.

Semble, what is matter for a plea of payment will not sustain a plea of set-off. *Ib.*

In debt for goods sold and delivered, and work and labour done, the pleas were, first, nunquam indebitatus; secondly, as to parcel of the sum demanded, to wit, 338*l.*, payment of 338*l.* in discharge of that parcel; thirdly, a set-off for money paid. The plaintiff proved a special contract for "good, sound, saleable bricks," to be made for him by the defendant, at a certain price per thousand, and delivery of as many thousands as, at that price, amounted to 396*l.* The defendant failed in making out a payment of 338*l.*, as laid in the second plea: only proving 314*l.* to have been paid. He proved a set-off of 21*l.*, and also that the bricks delivered were of bad quality. The jury found that the value of the bricks delivered did not exceed the 335*l.*, viz. the 314*l.* which had been paid, and the 21*l.* which the defendant was entitled to set off against the plaintiff's demand. On a special finding of these facts under 3 & 4 *W.* 4. c. 42. s. 24. the court directed a verdict to be entered for the defendant on the plea of nunquam indebitatus, as to the whole sum demanded, except 335*l.*:—for the defendant on the plea of payment as to 314*l.*; and as to the residue for the plaintiff; for the defendant on the plea of set-off as to 21*l.*, and as to the residue for the plaintiff: so as to give the defendant judgment on the whole record. *Ib.*

Effect of general issue in case for injury by dogs. 1085

Case for libel. The following matter was addressed by the defendant in a letter to *P.* "I (meaning the defendant) have reason to suppose that many of the *flowers* of which I (meaning the defendant) have been robbed are *growing* upon your premises, (thereby meaning that the plaintiff had been guilty of larceny, and had stolen from the defendant certain *plants*, *roots*, and *flowers* of the defendant, and had disposed of them unlawfully to *P.*, and unlawfully placed them in the garden of the last-mentioned person.") The case went to trial and the plaintiff had a verdict. Upon motion in arrest of judgment, on the grounds that the inuendo unduly enlarged the sense of the word "flowers" by extending it to "plants and roots," and that larceny could not be committed of growing flowers, except after a summary conviction for the same offence under 7 & 8 *G.* 4. c. 29. s. 42:—Held, that the count was good, for after verdict the court would contend that the libel had been shown at the trial to mean such flowers as might be the subject of larceny, either under, or notwithstanding the restriction of 7 & 8 *G.* 4. c. 29; and that flowers described to be "growing" in a garden must include their plants and roots. *Gardiner* v. *Williams*, E. 1835. 757

The defendant agreed to sell, and the plaintiff to buy "all the naptha which the defendant might make from the 1st *June* next for and during the term of two years, *say from* 1000 *to* 1200 *gallons per month*, at the rate of 2*s.* 6*d.* per gallon," &c. It was also agreed, that should the plaintiff be desirous of dissolving the said contract before the expiration of the said term, he should be at liberty to do so on giving the defendant three months' notice. In a declaration on this agreement the plaintiff averred that the quantities of naptha which the defendant *ought* to have made

during ten months under the agreement, at the rate of from 1000 to 1200 gallons per month, and to have sold and delivered to the plaintiff, amounted to 7000 gallons more than he had so sold and delivered to him, yet that the defendant had not sold and delivered the same to him. Held, that in the absence of all averment to explain the terms of the contract, or to show that the words "say from 1000 to 1200 gallons per month," were intended to warrant the delivery of, at least, that quantity, or that the defendant manufactured by fraud less than he ought to have done, the agreement was for all the naptha that the defendant's works might reasonably produce in two years, and therefore that the defendant was entitled to judgment. The contract amounted to a representation by the defendant, that in all probability the naptha produced would amount to 1000 gallons, for which representation, if fraudulent, he was liable to an action. *Gwillim* v. *Daniel*, E. 1835. 644

Assumpsit for goods sold. Plea, as to 9*l.*, that after the making of the promises, and before the commencement of the suit, defendant, at plaintiff's request, drew on a piece of paper, having thereon a 1*s.* 6*d.* bill of exchange stamp, an instrument purporting to be a bill, without a drawer's name thereto, whereby the defendant was required to pay to *such person or his order, who should place his name thereto as drawer*, 20*l.* at two months after date, as for value received; which instrument plaintiff requested defendant to accept towards payment and satisfaction of 9*l.*, and for the plaintiff's accommodation as to the rest, and which the defendant accepted accordingly, and delivered to the plaintiff, and thereby became liable to pay to the plaintiff or such person who should place his name thereto as drawer, or his order, the sum of 20*l.*, viz. towards payment of the sum of 9*l.* and for the plaintiff's accommodation as to the rest, and that the plaintiff accepted and received the bill in satisfaction of the sum of 9*l.*, which bill was not due at the commencement of the suit. Non assumpsit as to the residue.

Replication, that the bill remained unnegociated in the hands of the plaintiff without any drawer's name to it, and unpaid. Held, on demurrer to the replication, that it was bad, and the plea good; for, upon the facts disclosed in the plea, the plaintiff's right to sue for the original debt was suspended till the expiration of the two months, and till the maturity and dishonour of the instrument when completed as a bill. *Simon* v. *Lloyd*, E. 1835. 701

See *Allies* v. *Probyn*, 1079.

A declaration in debt on a bond in the penal sum of 12,000*l.*, set out a condition for payment of 6000*l.* *with interest*, but assigned as a breach the non-payment of the 6000*l.*, viz. the principal only. A plea that the defendant paid the 6000*l.* *with interest* according to the form and effect of the condition, was held bad on special demurrer, for importing a fact into the plea which was not alleged in, or necessarily to be implied from, the declaration. *Bishton and Another* v. *Evans*, E. 1835. 639

Pleading eviction as defence to trespass for rent. 1106

Assumpsit on a bill of exchange by indorsee against drawer. Plea, that the defendant's indorsement was in blank; that the defendant delivered the bill to *L. L.*, a person not a party to it, for the specific purpose of getting it discounted for the defendant, and paying him

the proceeds; but that *L. L.* fraudulently, and in violation of good faith, and of the specific purpose laid, delivered it to another person, also a stranger to the bill, on pretence of securing a debt due to him from *L. L.* Replication, that the defendant broke his promise without the cause alleged by him in his plea. On special demurrer to the replication, that the general replication de injuriâ in assumpsit was bad: Held, that the plea was bad in substance on general demurrer, for not showing distinctly that the defendant never had value for the bill. *Noel* v. *Rich*, E. 1835. 632

Semble, that the replication was good in substance, as putting in issue all the facts constituting the defence set up, viz. that the plaintiff was not a person who had a right to sue. *Ib.*

In an action of assumpsit for 5000*l.*, had and received by the defendant to the plaintiff's use, the defendant pleaded as to that sum, that the money so received by him was the amount of the proceeds of the sale of goods consigned to him by *P.* and *C.* as their own, with the plaintiffs' knowledge and assent, (but which in fact belonged to *P.* and *C.* and the plaintiffs jointly), as a security for any advances made to *P.* and *C.* by the defendant, with power of sale to reimburse himself for any such advances; and that he, not knowing that the plaintiffs had any interest in the goods, advanced 6000*l.* to *P.* and *C.* on the security of them, and afterwards sold them, and offered to set off that amount against the damages claimed by the plaintiffs. Replication, de injuriâ, and new assignment that the plaintiffs sued not only for the proceeds of the sale of the goods mentioned in the plea, but also for money received by the defendant to the plaintiffs' use, being the proceeds of other goods, which the defendant, by a letter to the plaintiffs, declared to be under his care on their account. Demurrer to the replication. Held, that as the plea was not mere matter of excuse, but denied the promise to the plaintiff, the general replication de injuriâ was bad; and that it was also bad for two other reasons, viz. that the plaintiffs claimed an interest in the money received by the defendant to the use of the plaintiffs, and also derived an authority immediately from the plaintiffs. *Solly and Another* v. *Neish*, E. 1835. 265

The plea was also held bad on special demurrer, for amounting to the general issue, and for duplicity. *Ib.*

To a declaration for assault and battery, the defendant pleaded that the plaintiff was his apprentice and conducted himself improperly and saucily, wherefore the defendant *moderately* chastised him. Replication, de injuriâ suâ propriâ. Held, that only the cause alleged in the plea was put in issue, viz. whether the plaintiff misconducted himself as apprentice to the defendant, and that evidence of immoderate and excessive chastisement could not be given upon the issue so joined. *Penn an Infant, by J. Penn his prochein amy*, v. *Ward*, T. 1835. 975

A count in trespass stated, that defendant assaulted plaintiff, and wrenched a stick from his hands, and with the said stick and his fists gave the plaintiff many violent blows, &c. Plea, as to assaulting the plaintiff with the said stick, and with his fists giving him blows, son assault demesne. Verdict for defendant. Held, that after verdict the plea should be read with a stop of time less than

a comma after the words "assaulting the plaintiff," so as to answer to the word "and," so that the plea sufficiently justified the battery as well as the assault with the stick. *Blunt* v. *Beaumont*, T. 1835. 1100

Covenant on a mortgage deed. The declaration stated the covenant to be to pay generally, and in the breach alleged a general non-payment. The defendant set out the deed on oyer and demurrer specially, alleging for cause, that the covenant was to pay the principal and interest at a specified day at or in the porch of a parish church: Held, that as the plaintiff has set out the deed according to its legal effect, he could not demur to the declaration on the mere ground of variance, because the deed, when set out on oyer, became part of the declaration; but had the breach laid in the declaration appeared to be no breach of the covenant set out on oyer, that would have been ground of demurrer. *Paine and Others, Executors of James Paine*, v. *Emery*, T. 1835. 1097

To a declaration on a bill by indorsee against his immediate indorser, who was the drawer, the defendant pleaded that he indorsed the bill to the plaintiff without having or receiving any value or consideration whatsoever for or in respect of his said indorsement, and that he the said defendant had not at any time had or received any value or consideration whatsoever for or in respect of such indorsement:—Held, after verdict for defendant, that the plea was good. *Easton* v. *Pratchett*, T. 1835. 1129

An administratrix concluded her declaration with a profert of letters of administration "duly granted by the consistory court of *St. Asaph*," omitting all statement of the grant of them in the body of the declaration, and not stating any date of such grant. Held bad, on special demurrer, for not showing that the letters of administration were granted by the proper authority, viz. the ordinary, or alleging that the consistory court of *St. Asaph* had a special power to grant them. *John Hughes and Elizabeth his Wife, Administratrix*, v. *Williams*, T. 1835. 1104

Assumpsit on a bill of exchange, by indorsee against acceptor, with counts for goods sold and money due on an account stated. Plea, as to 83*l.*, part &c., that after the several causes of action in respect of that sum had accrued, the plaintiffs—by agreement with the defendant, in consideration that the defendant would secure that sum, by executing a mortgage of certain premises when called on to do so, the amount to carry interest and be payable by instalments—undertook that no proceedings should be instituted against the defendant in respect of that sum, unless default were made in paying the instalments. The plea then averred the defendant's constant readiness to execute the mortgage, but that he had never been called on to do so. Held, that the plea was bad on special demurrer, for pleading matter of accord, without alleging it by way of satisfaction. *Allies and Others* v. *Probyn*, T. 1835. 1079

On joint or several covenants. See *Lane* v. *Drinkwater*. 40

Easement under 3 & 4 *W.* 4. c. 71. 68

Admitting facts alleged on previous pleading. 147

That promise was made on a Sunday. 116

See SUNDAY.

POLICE CONSTABLE. 244

POOR, DIRECTORS OF.

Liability of one of several. 316

POOR RATE.

Cannot be referred to arbitration. 1047

PORT AND PORT DUTY. 514, 871

See *Jenkins* v. *Harvey*, 326

POSSESSION. 309

POUNDAGE.

See SHERIFF.

PRACTICE.

(*Amendment.*)

In an action for negligence, by which a coach was injured, a plaintiff declared and proceeded to issue in the name of "*William*" *Moody*; the court refused to amend the proceedings by substituting the name of *John*, which was the name of the father of *William*, though *John* was sworn to be the party originally intended to be the plaintiff; for if that was the fact it was too late in the cause for the defendant to take advantage of the misnomer, and if it were not, no amendment should be granted for the purpose of letting in his evidence. *Moody* v. *Aslatt and Others*, H. 1835. 492

A plaintiff who has obtained an order to amend his declaration with leave to defendant to plead de novo, may proceed to trial without amending or rescinding the order to amend. *Black* v. *Sangster*, M. 1834. 171

(*Appearance.*)

An appearance irregular as to the parties' names, was entered in due time. The defendant, on receiving notice from the plaintiff of the mistake, promised to correct it; but afterwards, at the end of the next term after service of the writ, entered a new appearance in a fresh book, and having demanded a declaration, signed judgment of non-pros for not declaring in due time. The court set aside the judgment without costs, saying, the irregular appearance might have been amended in the book. *Bates* v. *Botten*, T. 1835. 1065

A defendant has till the end of the term after service of the writ to enter an appearance, if the plaintiff does not do so for him within eight days after such service, pursuant to stat. 2 *W.* 4. c. 39. sch. No. 1. *Ib.*

After a sheriff has returned that he has levied 40*s.* under a distringas, the plaintiff may enter an appearance without any affidavit of the due execution of the writ, for the return sufficiently shows it. *Page* v. *Hemp*, T. 1835. 1093

(*Attachment.*)

An attachment against a prisoner in custody of the marshal should be lodged with the sheriff, who will take him on it when he is out of that custody; and it is irregular to bring him up to charge him with it. *Boucher* v. *Sims*, T. 1835. 1093

(*Discontinuance.*)

If after general verdict for defendant, the plaintiff obtain a rule to discontinue, it will be set aside on motion. *Goodenough* v. *Beetles*, E. 1835. 793

(*Notice of Trial.*)

It is irregular to deliver an issue with a notice of trial indorsed for one day, and at the same time to deliver a separate notice of trial for a different day. *Kerry* v. *Reynolds*, T. 1835. 1094

(*Nul tiel Record.*)

Where, on issues of nul tiel record, the plaintiff draws up the record for the defendant, a four-day rule to produce the record must be served on the defendant. *Begbie* v. *Grenville*, H. 1835. 485

(*Proceeding to Trial.* See *Amendment.*)

(*Putting off trial.*) 488

(*Rules.*)

Mistakes in terms of rules may be amended on motion to open them made within the same term, or perhaps that following, but where more time has elapsed, the affidavits used on the occasion of making the first rule absolute, cannot be referred to in order to open it, unless the new motion is made and the new rule drawn up on reading them. *Lord* v. *Hope*, H. 1835. 487

(*Trial, Course at.*)

Where there are several defendants who defend and appear by several attornies and counsel, the latter may cross-examine the plaintiff's witnesses and address the jury separately. *Ridgway* v. *Philip and Broadhurst*, M. 1834. 131. *Sed qu.*

(*Right to reply.*)

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(*Right to begin.*) 571, 567, 568

PRESUMPTION.

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PRESENTMENTS.

See EVIDENCE.

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——— 4 *W.* 4. 534, 559
——— 4 *W.* 4. No. 1. 201
——— 4 *W.* 4. No. 1. s. 3. 567

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——— 4 *W.* 4. No. 5. 524
——— 4 *W.* 4. No. 8. 214, 485
——— 4 *W.* 4. No. 17. 526, 564, 790, 840
——— 4 *W.* 4. No. 19. 764
——— 4 *W.* 4. No. 19. 790
——— 4 *W.* 4. No. 20. 788
——— 4 *W.* 4. Nos. i. & ii. 535
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RENT.

Apportionment and suspension of. 1106

RENTS.

A. being tenant in fee, died in *January* 1833, during the currency of several *Lady-day* and *May-day* tenancies from year to year, without having given notices to quit in due time, and devised to *B.* for life, who died in *August* 1833, after the expiration of those years of tenancies, which were current at the death of the testator, and within the first half year of the fresh tenancies:—Held, that the administrator of *B.*, the devisee for life, could not recover that portion of the rent which became due between *January* 1833 and *August* 1833, under 11 *Geo.* 2. c. 19. s. 15.: for both the tenancies running during that time, were created not by her but by the tenant in fee, and did not therefore determine with her life. *Botheroyd, Administrator of Rebecca Shaddick,* v. *Woolley*, H. 1835. 522

REPLEVIN. See 1106.

REPRESENTATION, 644.

REPUTATION.

See *Crease* v. *Barrett*. 458

RESCINDING CONTRAC

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RESIDUE.

See *Hill* v. *Harvey*.

REVENUE LAWS.

Do not bind foreigners.—Se GLING.

SALE.

Deducting expenses of.—S RIFF.

SAY, 644. 655.

SCIENTER, 1085.

SEA-SHORE.

See *Talbot* v. *Lewis*.

SEAMEN.

The captain of a whaler wa owner of the vessel. A about to sail on a whaling signed articles of agreer to sue any of the ow wages except one, who captain, and the only own to the articles. The othe sold the cargo when broug received the proceeds, managing owner settled t with the seaman, but it the seaman could not owner not named in the *M'Auliffe* v. *Bicknell an* T. 1835.

On settling with the se his wages, the owner c make deductions for i and interest on advances him on account of wages. trial the owner's clerk pro charges to be usual. Th remonstrated against t eventually accepted the offered him minus the d and signed a receipt a

whole wages :—Held, that he was estopped from recovering from the owners, the sums thus deducted. *M'Auliffe* v. *Bicknell and Others*, T. 1835. See 1035.

A seaman stipulated, that instead of receiving monthly wages, he should have a 90th share of the net proceeds of the cargo to be obtained on a whaling voyage. The owner charged him with insurance on his share, though the freight had never been insured; the seaman remonstrated, but finally took the balance minus the deductions, and signed a receipt as for his whole wages: Held, that he was estopped from recovering back the item for insurance as money had and received to his use, and that the owner need not plead a set-off in order to insist on that deduction; for the seaman was a joint adventurer. *Ib.*

SEQUESTRATION.

Assignees of an insolvent incumbent, who have published a sequestration, are not entitled to receive arrears of composition for tithes due before such publication; for that writ only operates prospectively from the time of such publication. *Waite, Clerk*, v. *Bishop, Lawrence, Brooke, and Nokes*, M. 1834. 90

The property of an incumbent in the profits of his living is not bound from the time of lodging the *levari facias* in the bishop's registry. *Ib.*

A sheriff returned to a *capias utlagatum* on mesne process, that the defendant had no goods nor any lay-fee in his bailiwick, but had a rectory, without stating that he had seized it into his hands. The court awarded a *sequestrari facias*, in order that the plaintiff might obtain his debt out of profits paid into the treasury. *Rex* v. *Armstrong, Clerk, in the suit of Swann* v. *Armstrong*, E. 1835. 752

SETTLEMENT OF ACCOUNTS.

Effect of. 359. 1035

SET-OFF.

Taking plea of, distributively. 535

Evidence of, not admissible in plea of payment. 535

In action on bill or note. 172

SHERIFF.

See Writ of Trial.

In order to set aside an attachment against a sheriff for not bringing in the body, the affidavit should state that the application is made on his behalf, and at his expense, as well as that he is not in collusion with the defendant, by analogy to *Reg. Gen. K. B. M.* 59 *G.* 3. *The King* v. *The Sheriff of Surrey, in Weston* v. *Woods*, M. 1834. 184

In an action against a sheriff for extortion by his officer, the latter, in consideration of a stay of proceedings, undertook by a written memorandum to pay a sum of money to the plaintiff in seven days with costs, and on default of such payment, to withdraw his plea and suffer the plaintiff to have judgment. On motion to the court to compel the officer to perform his undertaking, they refused to do so in that summary way, saying he was not an officer of the court. *Brown* v. *Gerard, Bart.*, M. 1834. 220

An execution having issued against a trader, his goods were seized and sold under it, after he had committed an act of bankruptcy. The assignees having brought trover,—Held, that the jury, in assessing the damages, might deduct the expenses of the sale from the proceeds of the goods. *Clarke*

and Another, Assignees of Sutton, a Bankrupt, v. *Nicholson, Esq. late Sheriff of Surrey*, H. 1835. 233

A *fi. fa.* returnable 30th *December* 1833, was delivered to a sheriff to be executed on the 20th. The sheriff went out of office in *February* 1834, without executing the writ, and without having been ruled to return it. In *June* 1834, the new sheriff was ruled to return the writ, which not being done, a rule to return the writ was served on the under-sheriff of the late sheriff in *November* 1834. Held, that the late sheriff was not liable to attachment, (3 & 4 *W.* 4. c. 99. s. 7.) *Yorath* v. *Hopkins*, E. 1835. 794

The sheriff, if not judge of the county court, is such a constituent part of it for the issuing process of execution on its judgments, that he is not liable for a wrongful act done by the bailiff in executing such process, he, the sheriff, not being bound to execute it personally, as in the case of writs of execution directed to him out of a superior court, and not appointing the bailiff who executes it. *Tunno* v. *Morris, Esq.*, T. 1835. 949

A sheriff levied goods of defendant appraised at 824*l.*, under crown process of extent in chief against him, for penalties of 1000*l.* incurred under the excise laws. The sheriff remained in possession during a long negotiation entered into with the excise by the defendant to mitigate the penalties. At last the excise accepted 500*l.*: Held, that the sheriff was entitled to poundage, not on 824*l.*, the whole value of the goods seized, but on 500*l.* only, that being the sum actually obtained by the crown. *Rex* v. *Robinson*, T. 1835. 1095

The particulars of demand claimed 16*l.* 10*s.* 8*d.* for goods sold an delivered, and an order w granted for trial before the sheri under 3 & 4 *W.* 4. c. 42. s. 1 The writ of summons when pr duced was indorsed for a su above 20*l.* The defendant had verdict on evidence not cover by the plea. The court set asi the verdict, and amended the wr of summons by altering the i dorsement to 16*l.* 10*s.* 8*d.*, allo ing the defendant to plead de nov *Edge* v. *Shaw and Wife*, T. 1835. 112

A sheriff who receives an ord to try a cause, must try it, thoug the writ of summons be indorse for a sum above 20*l.* *I*

The court will not grant a sheri relief under sect. 6. of the inter pleader act 1 *W.* 4. c. 58., if at th time of the motion the goods in dis pute, or their proceeds, are not i his hands but paid over. *Scott Assignee*, v. *Lewis, Esq.*, T. 1835. 108

Delivery of a warrant under a ca. sa to a deputy sheriff at his office in *London*, within the next term after that in which judgment was signed, is a charging in execution in due time, being the same as a delivery to the sheriff. (3 & 4 *W.* 4. c. 42. s. 20.) *Williams* v. *Waring*, T. 1835. 1128

Trial before. See JUDGMENT AS IN CASE OF NONSUIT.

SITTINGS IN TERM.

Johnson v. *Budge*. 197

SLANDER.

Where a plaintiff recovered less than 40*s.* damages for words slanderous in themselves, and spoken of him in his capacity as a schoolmaster, he is entitled to no more costs than damages, and the judge cannot certify for full costs (21 *J.* 1. c. 16. s.

6.) *Goodall* v. *Ensell*, E. 1835. 793

SMUGGLING.

A foreign vessel not square rigged, and coming within a league of the shore of any part of the united kingdom, having had prohibited goods on board in the same voyage, though having unshipped them before coming within that distance, is liable to forfeiture on information in rem, under 3 & 4 *W.* 4. c. 53. s. 2. *Attorney-General* v. *Schiers and Another*, T. 1835. 1029

SPECIAL CASE.

Under 3 & 4 *W.* 4. c. 42. s. 25. 451

STAMPS.

See Bills and Notes.

A promissory note for payment of 20*l.* to *B.* on demand, with lawful interest till payment, for value received. Held, that this was a note of the second class mentioned in 55 *G.* 3. c. 184., viz. payable *otherwise* than to bearer within two months after date; and therefore required only a 1*s.* 6*d.* stamp. *Dixon* v. *Chambers*, H. 1835. 502

Where a stamped paper, containing one agreement, refers to another unstamped paper, so that the two papers in fact form only one agreement, the latter is admissible in evidence, without a stamp. *Peate* v. *Dicken*, M. 1834. 116

An instrument executed in 1805 was then stamped with a 15*s.* stamp as an agreement, being in reality a lease, and as such liable to a 1*l.* 10*s.* stamp. In 1834 it was stamped in pursuance of 37 *G.* 3. c. 136. s. 2. with a 1*l.* stamp, that being the lease stamp imposed in 1815 by 55 *Geo.* 3. c. 184., which repealed the existing duties. Held, that it was properly stamped. *Buckworth* v. *Simpson and Another*, H. 1835. 344

Real estate was devised to trustees for the benefit of several parties for life, and after their deaths to be distributed among their children and others. The devisor added this direction, "it shall be *lawful* for the trustees to sell the same, or any part thereof, as shall appear most expedient to any trustee or trustees for the time being, towards the management of my property and affairs. *In the matter of the Estate and Effects of John Evans, deceased*, E. 1834. 660

A part was sold by the trustees soon after the death of the devisor, it being advantageous so to sell it for building, and the rest was sold ten years after by order of a court of equity. Held, that neither sale was of property *directed* to be sold by the testator, within the meaning of 55 *G.* 3. c. 184., schedule, part 3., and therefore that no stamp duty was payable. *Ib.*

STATUTES.

Exception of one thing in, cannot impose a charge on another by implication. 1007

1 *Edw.* 3. c. 16. 192

4 *Edw.* 3. c. 7. 994

4 *Edw.* 3. c. 11. 990

25 *Edw.* 3. c. 2. 286

34 *Edw.* 3. c. 1. 192

7 *H.* 4. c. 9. 369

8 *H.* 6. c. 5. 879

23 *H.* 6. c. 9. 781

23 *H.* 8. c. 15. 323

27 *H.* 8. c. 20. 443

32 *H.* 8. c. 9. 754

——— c. 34. 354

34 & 35 *H.* 8. c. 36. ss. 91 & 128. 903

37 *H.* 8. c. 12. 439

2 & 3 *Edw.* 6. c. 13. 438

1 *Eliz.* c. 11. 518

31 *Eliz.* c. 3. s. 1. 198

43 *Eliz.* c. 5. 237

1 *Jac.* 1. c. 15. 494

21 *Jac.* 1. c. 3. 393
——— c. 16. 955
——— c. 16. s. 3. 748
——— c. 16. s. 6. 793
——— c. 23. s. 3. 237
13 & 14 *Car.* 2. c. 11. 516
17 *Car.* 2. c. 8. 197
29 *Car.* 2. c. 3. 650
——— c. 3. s. 16. 100
——— c. 7. 116
5 *W.* 3. c. 21. s. 11. 19
9 & 10 *W.* 3. c. 25. s. 59. 19
3 *Will. & M.* c. 11. 365
4 *Ann.* c. 16. s. 20. 785
7 *Ann.* c. 20. s. 17. 1008
8 *Ann.* c. 7. s. 17. 520
3 *G.* 1. c. 15. s. 3. 1095
12 *G.* 1. c. 29. 724
——— c. 29. s. 2. 31
2 *G.* 2. c. 23. s. 23. 384, 772
5 *G.* 2. c. 30. s. 41. 24
11 *G.* 2. c. 19. 734
——— c. 19. s. 8 & 9. 413
——— c. 19. s. 15. 522
——— c. 19. s. 21. 409
——— c. 19. 591
17 *G.* 2. c. 5. s. 6. 783
18 *G.* 2. c. 20. 480
24 *G.* 2. c. 44. s. 1. 200, 583
——— c. 44. 481
——— c. 44. s. 6. 189
32 *G.* 2. c. 28. s. 13. 429
14 *G.* 3. c. 78. s. 43. 725
25 *G.* 3. c. 35. s. 9. 896
30 *G.* 3. c. 82. s. 7. 603
35 *G.* 3. c. 73. s. 221. 317
36 *G.* 3. c. 69. 603
37 *G.* 3. c. 136. s. 2. 344
38 *G.* 3. c. 60. s. 56. 460
39 & 40 *G.* 3. c. 104. s. 12. 796
42 *G.* 3. c. 99. s. 2. 660
43 *G.* 3. c. 46. s. 3. 355
——— c. 99. s. 2. 431
55 *G.* 3. c. 103. 911
——— c. 184. 660
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STATUTES, LOCAL.

See Costs.

SUBPŒNA.

Attendance on. See *Dixon* v. *Lee.* 180

SUNDAY.

A plea that the promise and undertaking mentioned in the declaration was made on a Sunday, need not conclude contra formam statuti (29 *C.* 2. c. 7.) *Peate* v. *Dicken.* 116

An attorney is not within 29 *C.* 2. c. 7, and if he were an attorney, who on a Sunday entered into an agreement to settle his client's affairs, by which he incurred personal responsibility, would not be "exercising his ordinary calling" within that act. *Ib.*

Cases collected. 122 *n.*

TENANCY AT WILL.

A tenancy at will is determined by the lessor's execution of a feoffment with livery of seisin indorsed, followed up by livery of seisin to the feoffee made by the lessor's attorney on the land, though at the time the livery was so made, the tenant at will was off the land, and had no notice of the determination of the will. *Ball* v. *Cullimore, Thomas Withers, and Others,* E. 1835. 753

TIN MINES.

Tolls of, &c. 458

TITHES.

The rector of a parish situate partly in the city of *London,* and partly in the county of *Middlesex,* filed a bill against the occupiers of certain houses situate within the *Middlesex* part of the parish, for payment by them as occupiers or tenants of the said houses respectively, of certain sums which they as such occupiers or tenants of the said houses respectively, were by ancient custom or usage, time out of mind, bound to pay to such rector in lieu of tithes annually. The time when the sites occupied by the houses were first built on did not distinctly appear, but it was proved that for 100 years past the successive occupiers of these particular houses had uniformly paid to the rector for the time being, certain specified and invariable sums in respect of each house. Payments of this nature were not general throughout the *Middlesex* part of the parish, nor

were they claimed from houses on new sites. The sums paid by each respective house were different, and did not appear to bear any distinct rate or proportion to the values of the particular houses *inter se*. Held, that the proper inference from these facts was, that the payments claimed had been made from time immemorial, and, consequently, that they were legally recoverable; not only because a legal origin could, in several ways, be suggested for them, but also with reference to a repeated series of decisions establishing similar payments under circumstances resembling those before the court. *Beresford, Clerk*, v. *Newton, Anderdon and Others*, H. 1835. 432

TOLLS.

In 1795 the corporation of *Truro* let to the plaintiff's testator the office of meter of the borough, with all fees, emoluments, &c. arising from the measuring of coal, &c. which should be imported or exported within the limits of the borough, after proving the corporation's right to toll. In assumpsit for this toll it was proved, that from 1772 to 1828 (fifty-six years) their lessees had received 4*d.* a chaldron upon the measuring all coal imported as above. The judge told the jury that he knew no rule of law which, upon the evidence of modern usage laid before them, would prevent them from presuming the immemorial existence of the right to the payment; but did not inform them that the plaintiff might be entitled to it as a port-duty, and therefore, not against common right, or requiring an origin so ancient as the time of legal memory:—Held, that though this omission might not amount to a misdirection, a new trial must be granted. *Jenkins, Executrix*, v. *Harvey*, H. 1835. 326

Assumpsit for a toll in the nature of a port-duty. The first count stated, that the mayor and burgesses of the borough of *Truro* had, from time whereof the memory of man was not to the contrary, held and exercised by the mayor of the said borough, or the lessee or lessees of the said mayor &c. for the time being, or their deputy or deputies, a certain ancient office or place of meter for the measuring of all coal imported by sea, and brought within the limits of the port of *Truro*, to be there disposed of, and that from time whereof &c., there had belonged to the said mayor and burgesses, by reason of the said office, an ancient fee, reward, or toll, for the measuring as aforesaid, and for the keeping and maintaining of measures, weights, &c., *i. e.* the fee &c. of 4*d.* the chaldron, to be received for the measuring, or being ready and willing to measure each chaldron of coal imported as aforesaid, to be disposed of by measure, and the fee &c. of 8*d.* by the three tons, to be received for the weighing (*or being ready and willing to weigh*) each chaldron of coal imported as aforesaid, to be disposed of by measure. Averment, that the corporation demised to the plaintiff the office of meter, with the fees and privileges belonging to it, under which the plaintiff claimed a toll from the defendant, in respect of a cargo of coals imported by him into the port of *Truro*. In another count the office was not stated to be immemorial, and in others the toll was claimed as receivable by the corporation or their lessees from all importers of coal by sea within the limits of the port. The jury

returned a verdict in writing as follows:—" We find for the plaintiff, and that the corporation of *Truro* have from time immemorial been possessed of, and have exercised the office of meter, and have from time immemorial received for the performance of the duties of the office the sum of 4*d.* a chaldron on coal and culm. We do not find for the plaintiff on any other count." Held, that this finding was meant to be on the first count, and that by it the jury did not intend to negative the title of the corporation or their lessees to the metage as connected with the port, or to disconnect the office of meter from their title to the port, or to import that the corporation were only entitled to the payment on actual measurement of the coals, but meant to affirm their claim to the metage on the only grounds which would support it in law, without performing the actual service of measurement for it, viz. their ownership of the port and obligation to maintain it, and consequently that the first count of the declaration was supported by the finding. *Jenkins, Executrix,* v. *Harvey,* T. 1835. 872

Held also, that such finding embraced the claim of 8*d.* by the three tons for weighing, or being ready to weigh the coal imported. *Ib.*

Held also, that no objection to the toll could be sustained on the ground of rankness, it being due to the corporation as owners of the port, as well as for their measuring. *Ib.*

Acts of ownership and repair of the port by the corporation were proved. Two leases of the office of meter of the borough, of the fees accruing from measuring corn, grain, coal, &c. exported or imported within the limits of the port, claimed, were produced, the first dated in 1752 in consideration of 613*l.* The other bore date in 1795. The fee of 4*d.* per chaldron was shown to have been paid uninterruptedly from 1772 to 1828, though the actual measurement was not by the corporation meter, but in his presence, and was had for the purpose only of ascertaining the customs and duties due to the crown on coal carried coastwise. Evidence was given that payment was made for flour in sacks, though not actually measured. A corporation book dated 1630 was also in court at the trial. Held, that this was such sufficient *primâ facie* evidence, in the absence of evidence to contradict it, as would support the finding of the jury, and show that the corporation, as well as the office of meter, and the fee in respect of coals imported though not actually meted, were immemorial. *Ib.*

TRANSFER.

To *C.* of debt due from *A.* to *B.* see 1042

TREES.

See EXECUTORS.

TRESPASS.

For heightening wall. See *Wells* v. *Ody.* 725

Only maintainable for false imprisonment, where process absolute nullity. 721

Trespass for assault and false imprisonment, and taking the plaintiff to a police station-house. Plea: that defendant was possessed of a dwelling-house, and that the plaintiff entered the dwelling-house, and then and there insulted, abused, and ill-treated the defendant and his servants therein, and greatly disturbed them in the peaceable possession thereof, against the

king's peace; whereupon the defendant requested the plaintiff to cease his disturbance and to depart from and out of the house, which the plaintiff refused to do, and continued in the same, making the said disturbance and affray therein: that thereupon the defendant, in order to preserve the peace and restore good order in the house, gave charge of the plaintiff to a certain policeman, and requested him to take the plaintiff into his custody to be dealt with according to law; and that the policeman, at such request of defendant, gently laid his hands on the plaintiff for the cause aforesaid, and took him into custody. *Timothy* v. *Simpson*, H. 1835. 244

The facts proved were, that the plaintiff passing the shop of defendant, a linen-draper, went in and required to purchase an article at a price marked on a ticket apparently affixed to it. The plaintiff disputed with the shopman about the price, and was desired to leave the shop, which he refused to do. One of the shopmen then attempted to turn him out, and, on the plaintiff's resistance, the other shopmen took part against him, and an affray took place. Defendant entered the shop before the scuffle ended, and desired the plaintiff to leave the shop quietly, which he refused, unless he could get his hat; upon which the defendant gave him in charge to a policeman, who took him to a station-house, where the charge was dropped. Held, first, that the plaintiff having persisted in remaining on the spot where the affray had taken place, the giving him in charge was justifiable, under the above circumstances, in order to prevent the affray from being continued or renewed: secondly, that the plea was not substantially proved, for the defendant had failed to prove any assault on himself. *Ib.*

Trespass for breaking and entering 'one close called the *Rail-road*, and one other close formerly used as a rail-road,' on the 1st *January* 1830, and on divers other days and times, and for tearing up the roads and converting the materials. *The Company of Proprietors of the Monmouthshire Canal Company* v. *Harford and Others.* M. 1834. 68

The third plea was, that the closes in which &c., were made and maintained by the plaintiffs as part of a railway under a local act, and were and are used as a part of such railway under that act; and that plaintiffs were possessed of the closes in which &c., without having taken from the owners of the fee any conveyance of the freehold interest therein. That several persons named were seised in their demesne as of fee in the closes next adjoining the closes in which &c., on either side; that those adjoining closes contained valuable minerals, which could only be conveniently carried by means of a rail-road across the locus in quo. The plea then justified the trespasses as committed by the defendants as servants of the owners of the fee, for the purpose of carrying minerals dug on one side of the rail-road to the other, by means of another rail-road, and for the necessary and more convenient use and occupation of the said closes for the said purposes. Replication, de injuriâ absque residuo causæ, having first protested the seisin of the alleged owners in fee. *Ib.*

The 14th plea stated, that for twenty years next before the commencement of the suit, the occupiers of the closes adjoining the

locus in quo had *of right and without interruption* used and been accustomed to use the privilege and easement of passing and repassing &c., and the laying down rail-roads across the plaintiffs' rail-road. The replication to the third plea traversed the user as of right and without interruption. New assignment, that the trespasses were committed with other and different purposes, &c. Judgment by default thereon. *Ib.*

The particulars of the plaintiffs' demand were for trespasses committed by the defendants in *April* and *May* 1830, in "a close which now is or heretofore was a rail or tram-road," and destroying the plates of the same, and putting down others. It was proved that in *February* 1829, the defendants took up some of the plates of the plaintiffs' rail-road, and diverted the course of a part, carrying it in a new line over their own ground, and then made a rail-road crossing the site of the old and also the new rail-road:—Held, that the particulars pointed to the old rail-road, and were sufficient. *Ib.*

On the third issue the plaintiffs gave evidence to prove that in constructing the cross rail-road the defendants had in view an ulterior object, and not merely the necessary and convenient occupation of their closes on either side the locus in quo (the plaintiffs' rail-road.) The defendants called witnesses to prove the contrary. The judge directed the jury that the question was, whether the cross rail-road was made bonâ fide for the more necessary and convenient occupation of the defendants' closes, or for some ulterior object?—Held, that he was right. *Ib.*

On the 14th issue, whether the defendants had for twenty years as of right, and without interruption, used and enjoyed the easement of passing across the locus in quo (the plaintiffs' rail-road) in the manner stated in the plea:—Held, that the defendants were bound to show an *uninterrupted enjoyment as of right* during that period, and that the plaintiffs might prove the defendants' applications to them during the twenty years for leave to cross their rail-road, without specially replying such licence so granted under the eighth section of 3 & 4 *W.* 4. c. 71. *Ib.*

TRIAL.

A cause was in the paper for a sitting in term, which begun on the 17th, and was adjourned to the 19th. On the 18th, and before the case was tried, the defendant died. (17 *Car.* 2. c. 8.) The court refused to allow the trial to take place on last day of term, and refused to interfere to direct it to be tried after the term, and to enter the verdict as of a sitting in it. *Johnson* v. *Budge*, M. 1834. 197

TROVER.

In trover for a chaise, it appeared that a third person had hired it from the plaintiff, and afterwards left it for sale at the defendant's repository for carriages in the city of *London*. While there it was attached by process out of a city court against the third party. After which the plaintiff demanded it from the defendant, who refused to deliver it, on the ground that it had been so attached, and that he should be liable for its value if he gave it up:—Held, that there was no evidence of a conversion of the chaise by the defendant to his own use, it being at the time of the demand in the custody of the law, and the defendant relying on that ground for his refusal. *Verral* v. *Robinson*, T. 1835. 1069

Election between trover and money had and received. 152, 155

See PLEADING.—WAIVING TORT.

TURNPIKE ROADS AND TOLLS.

A local act empowered trustees of a turnpike road leading into a town to collect tolls from persons passing more than a hundred yards along it, and to borrow money on the credit of the tolls. By an act for improving the town, the road trustees were prohibited from repairing a certain portion of it nearest the town, and the town commissioners were to maintain it in future:—Held, that the road trustees might still take the same tolls for passing over that part, and that it still continued part of the same turnpike road for all purposes but that of repair. *Phipson* v. *Harvett*, M. 1834. 54

UNITED KINGDOM.

What as to in customs laws. 514

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USAGE. See TITHES.

As to bill brokers. See *Wood* v. *Poole*, 255.

As to taking tolls. See *Jenkins* v. *Harvey*, 326.

VARIANCE.

The recital of the writ in the commencement of a declaration is unnecessary, so that if in a writ so set out the plaintiff sues as assignee, and then proceeds to state a bond made to himself, the variance affords no ground of demurrer. *Reynolds* v. *Welsh*, M. 1834. 202

In writ. See 130, 320.

Between defendant's name in c and bail-bond.

VENDOR AND PURCHAS

Lands were bought at a sal auction under an extent. purchaser afterwards resold for a less sum than that whi had given. No conveyance h been executed to him, he wa sirous to save the ad valorem s duty on such a conveyance, the court, with consent o Attorney-General, ordered name of the sub-purchaser substituted for that of the ori purchaser in the original co of sale, and that the convey should be made to the latte sum paid into the bank by th ginal purchaser being state them to be the consideration. *King* v. *Philip Rawlings, Ex Hand*, T. 1835.

VENUE.

Where in an action for libel a was granted to change the v from *London* to *Lincolnshire* o usual affidavit, a rule to bri back to *London*, on affidavit the libel was published the well as in *Lincolnshire*, was absolute, without calling on plaintiff to undertake to give terial evidence in *London*. *Cle* v. *Newcome*, H. 1835.

If an application to change the v has been improperly grante the usual affidavit, and a ru obtained to discharge it, it answer to that rule that ther special grounds for changing venue, and the plaintiff wi entitled to retain it; for the s grounds of changing the should have been made the su of a distinct motion. *Dalt Trevillion*, M. 1834.

Transitory in action for not repa

Inserting venue in body of pleading. How taken advantage of. *Townsend* v. *Gurney*, M. 1834. 214

The venue will not be changed on the common affidavit where part of the claim is on a bill of exchange, though the rest is for goods sold and delivered. *Walthew* v. *Syers*, M. 1834. 217

See PLEADING.

VERDICT.

See EVIDENCE.

VIDELICET. 535

WATERCOURSE.

By a canal act, 30 *G.* 3. c. 82. s. 7., the owners of certain works called the *Pentyrch* works, were entitled to all the surplus water, or such as *should not be necessary for the use of the canal.* By a subsequent act, 36 *G.* 3. c. 69., the canal company were required to finish the canal and all the *works* and extension of the same within two years, and were prohibited from making alterations in it after that time. After that time, however, they erected an engine for the purpose of forcing up water from a river into the canal above the *Pentyrch* works, by which increase in the quantity of water, the canal became deep enough to pass down a greater number of boats than it could have done before:—Held, that the diminution of the supply of surplus water to the *Pentyrch* works, in consequence of the increased trade, was actionable by them, and that they might recover consequential damages. *Blakemore and Booker* v. *Glamorganshire Canal Company*, E. 1835. 603

It was also enacted, that for the purpose of better securing the surplus water for the benefit of the *Pentyrch* works, the lock which should be made below and nearest to them, should always be kept in good and sufficient repair by the canal company, for the purpose of preventing leakage or the waste of water, &c. The canal company made a notch or drawgate, by which they supplied the lower part of the canal with water at a point below the lock, directed by the act to be kept water-tight:—Held, that they had no right to convey water, not necessarily used at that lock, in passing vessels through it down the canals to any lower pond of it, though wanted there for the purposes of the navigation; and that the notch was a *work* not authorized by the act. *Ib.*

An action for diverting a watercourse, to which the general issue was pleaded before the new rules, was referred at the assizes, with all matters in difference, to an arbitrator, with power to determine the cause between the parties, the costs of the cause to abide the event. He awarded that a nonsuit should be entered, on the ground that the defendant was not proved to have diverted the water; but decided that the plaintiff had the right to the water. Held, that before the new rules, the defendant was entitled to recover the costs of all his witnesses, as well before the arbitrator as at the trial, including as well those called to prove his right to the water, as those adduced to disprove his having diverted it. *Ratcliffe* v. *Hall*, E. 1835. 770

WAIVING TORT.

By assignees of bankrupt. *Bradbury and Another, assignees, &c.* v. *Anderton.* 152, 155

WAREHOUSE.

See CUSTOMS—CUSTOMS LAW.

the defendant had no effects. The plaintiff's attorney thereupon lodged a *ca. sa.* at the deputy under-sheriff's office in *London* on that day, but finding before the return of the *fi. fa.* and before execution of the *ca. sa.* that the defendant had effects, wrote to the under-sheriff to countermand the execution of the *ca. sa.* Held, that the sheriff was bound to return the *fi. fa.*; and *semble*, the issuing the *ca. sa.* did not countermand the levy under the *fi. fa.* *Smith* v. *Johnson*, T. 1835. 981
See *Dicas* v. *Warne*, 10 Bing. 341.
Whether the lodging a *ca. sa.* at the office of the deputy under-sheriff in *London*, be a supersedeas of a former writ of *fi. fa.*, *quære.*

On a rule for setting aside a distringas, the only question is, whether there is not enough on the plaintiff's affidavits to justify the granting the distringas; unless *comm. semb.* the defendant has sustained substantial injury under special circumstances. *White* v. *Johnson*, T. 1835. 1033

The *ca. sa.* in an action on a bond conditioned in a penalty of 312*l.*, was indorsed to satisfy 188*l.* 9*s.* with further interest from 31st *January* then instant, upon 156*l.* *until* paid, Held sufficiently certain. *Williams* v. *Waring*, T. 1835. 1134

Executing. See SHERIFF. 794

(*Capias.*)

A capias described the defendant as "*Francis Harvey*, late of *Devonshire Terrace, New Road*:" Held, that this was a sufficient description within the words "*C. D.* of &c." in 2 *W.* 4. c. 39. and sched. No. 4.: as the defendant had been found by that description, was not sworn to have any residence at the time of the arrest, and was not identified in any
Hill v. *Harvey*, T. 18
Middlesex was miswritte
in the body of a wri
Held, that this mistak
justify a baron's ord
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tody on entering a c
pearance. *Colston* v.
1835.

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capias delivered to a
pursuant to 2 *W.* 4.
sheriff was directed
defendant (a woman)
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"and *her* safely keep."
immaterial variance.
Mary Ann Burgess, H.
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indorsed, "if the amc
be paid within four da
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sufficient, and that the
rest or" might be rejec
plusage. *Ib.*

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dorsed: "The plai
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that provided by *Reg.*
2 *W.* 4. by substituti
hereon" for "service he
the court permitted the
amend the indorsemen
Hooper v. *Walker*, M. 1
See *Sutton* v. *Burgess*, 32
words "arrest or" are

A capias which states th
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notice was not given within a reasonable time before the trial, as directed by *Reg. Gen. Hil.* 4 *W.* 4. No. 20. Held, that the plaintiff having obtained a verdict at the trial, was entitled to the costs of a witness called to prove the defendant's hand-writing. *Tinn* v. *Billingsley*, E. 1835. 788

1*s.* a mile ought not to be allowed to witnesses for travelling expenses, unless it had been paid them, and not if it was shown before the master that their actual expenses were less. *Ratcliffe* v. *Hall*, E. 1835. 770

A judge has a discretion whether or not a witness shall be recalled after the case of the party who called him is closed. *Adams* v. *Bankart and Another*, H. 1835. 425

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Proof on common counts, with plea of general issue. *Cousens* v. *Paddon.* 535

WRECK.

See EVIDENCE.

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WRIT.

See CAPIAS.

If a first writ is discontinued, and the costs are taxed and paid, it is not necessary that the plaintiff should give the sheriff notice of such discontinuance, or serve the rule on him before arresting the defendant on a fresh writ; and the court refused to discharge a defendant from such second arrest, on the ground that the discontinuance of the first action was incomplete on account of that omission. But they would have relieved against any actual damage sustained by the defendant. *Price and Others* v. *Day, Hope, and Others*, H. 1835. 456

Recital of in declaration. See VARIANCE.

WRITS.

A capias ad satisfaciendum in the body of it stated the sum recovered to be 100*l.*, but was indorsed for 88*l.* only, that being the real amount of the damages and costs; and the defendant was actually taken in execution for the smaller sum. After rule obtained to set aside the *ca. sa.* and discharge the defendant out of custody, a rule was obtained to amend the *ca. sa.* The court set aside the first rule with costs, and made the second absolute on payment of costs. *Annull* v. *Weatherby*, H. 1835. 485

A writ of summons stated the form of action to be trespass on the case, without indorsement of the sum demanded. The particulars of demand were for wages. They were delivered at the same time with the notice of declaration. As the plaintiff had not declared, the writ was set aside for irregularity. *Davies* v. *Jones*, M. 1834. 182

Defendant's addition need not be inserted in a writ of summons, under 2 *W.* 4. c. 39. sch. No. 1. *Morris* v. *Smith*, H. 1835. 523

Writs of summons as well as capias may be indorsed, "This writ was issued by &c. attorney for the said *plaintiffs*," without naming him (see 2 *W.* 4. c. 39. schedule.) *Hennah and Another* v. *Wyman*, E. 1835. 792

On 23d *April*, a *fi. fa.* was sued out into *Bedfordshire*, and lodged in the office of the deputy under-sheriff in *London* (3 & 4 *W.* 4. c. 42. s. 20.) On 25th *April*, viz. by return of post after its receipt, the under-sheriff wrote to say that

AN

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See INCLOSURE ACT, 1.

ACTION ON THE CASE.

1. *A.* erected a mill in 1823 on his own land, the former owner of which had for twenty years before 1818 appropriated the water of a stream running through it, to the purposes of watering his cattle and irrigating his land. In 1818, *B.* had erected a mill near the same stream, and the owner and occupier of *A.*'s land then gave a parol licence to *B.* to make a dam at a particular spot, and take what water he pleased from that point, which water was so taken, and returned by pipes into the stream above the spot where *A.*'s mill was afterwards erected. In 1818 *B.*, without licence, conveyed part of the water which had before flowed into the stream from certain springs, into a reservoir for the use of his mill. In 1828, *A.* appropriated to the use of his mill all the surplus water which flowed through and over the dam, and which was not conducted into the reservoir. In 1829, *A.* demolished the dam erected by *B.*, and gave him notice not to divert the water. *B.* then erected a new dam lower down the stream, and by means of it diverted from *A.*'s mills, at some times, all the water before appropriated by *A.*; at others, a part of it; and the water when returned into the stream, was in a heated state: Held, on special verdict,

First, that whether the right to the use of flowing water be in the first occupant, or in the possessor of the land through which it flows, was entitled to the surplus water; for he was first occupant of that, and also owner and occupier of the

the land through which it flowed, and might maintain an action for the injury sustained by the abstraction or spoiling of such surplus water.

Secondly, that *A.* was in like manner entitled to recover in respect of the water diverted by *B.* at his new dam; because the licence granted to *B.* by the former occupier was, to take the water at one particular point, and not at the place where his dam was made; and further, because if the licence had been general to take at any place, it would have been revocable, except as to such places where it had been acted on, and expence incurred; and it was revoked before the last dam was erected.

Thirdly, that *A.* was entitled to recover for the water diverted from the springs, and collected in a reservoir in 1818: for the possessor of land through which a natural stream flows, has a right to the advantage of that stream flowing in its natural course, and to use it when he pleases for his own purposes; no adverse right having been acquired by actual grant, or by twenty years' enjoyment.

Whether such possessor of land can maintain an action for the mere violation of such general right by diversion of the water, &c., without having sustained any special injury, Quære. *Mason* v. *Hill*, *T.* 3 *W.* 4. Page 1

2. An action of deceit does not lie against a person making an untrue representation to another, on the faith of which the hearer acts, and thereby incurs damage, if the party making such representation did not know it to be untrue.

The owners of a ship circulated advertisements of sale, beginning with a description of the ship, which stated her to be c fastened; after which was a that the hull, masts, yard rigging, were to be taken v faults. Under this was the word "Inventory," whi followed by a list of the stores and tackle; and the then a further announceme the vessel and her stores be taken with all faults, an out allowance for weight, quality, quantity, or any whatever. The owners afte executed a written conti sale, not stating the vessel copper-fastened, but con this clause: "On payment purchase money, the saic with what belongs to hei be delivered *according to ventory which hath been exh* but the said inventory sl made good as to quantity and the said brig, togethe her stores, shall be taken w faults, in the condition the lie, without any allowan weight, length, quality, c defect whatsoever:"

Held, (assuming that tl vertisement could, by wo reference, be incorporate the contract of sale,) th word "inventory" in the co referred only to the list of &c. and not to the prior the advertisement: and, the that on the two documents together, no warranty ap that the ship was copper fas *Freeman* v. *Baker and a M.* 4 *W.* 4. Pa

ADMINISTRATION.

See SETTLEMENT BY RENTI TENEMENT, 1.

AI

ADMITTANCE.

See COPYHOLD, 2, 3.

ADOPTION OF ROAD BY PARISH.

See HIGHWAY.

AFFIDAVIT TO HOLD TO BAIL.

See PRACTICE, 12.

AGREEMENT.

See PLEADING, 5. 7. PRACTICE, 7.

ALDERMAN.

See MANDAMUS, 1.

AMENDMENT.

See PLEADING, 1.

ANNUITY.

See DEVISE, 2. JUDGMENT.

APPEAL.

See MANDAMUS, 3, 4. 7. SESSIONS.

The parish of *Bishop Wearmouth* has no overseers of the poor; but contains several townships, separately maintaining their own poor, and having distinct overseers. Two of these townships are called *Bishop Wearmouth* and *Bishop Wearmouth Panns*. Paupers, whose settlement was in *Bishop Wearmouth Panns*, were, by an order of justices, directed to be removed to the parish of *Bishop Wearmouth*. The order was served on the overseer of *Bishop Wearmouth Panns*, who refused to receive the paupers (on the ground that that township was not named in the order) unless certain expences were waived. This being refused, the paupers were taken away. The removing parish afterwards served the churchwarden of the *whole parish of Bishop Wearmouth* with the order, and delivered the paupers to him. The latter took the paupers to the workhouse of *Bishop Wearmouth* township, where they were maintained:

Held by *Denman* C. J. and *Littledale* J., *Taunton* and *Patteson* Js., dubitantibus, that the inhabitants of the township of *Bishop Wearmouth*, although they were not bound to maintain the pauper under the order, had reasonable ground for thinking that they might be aggrieved by it, and therefore were entitled to appeal. *The King* v. *The Inhabitants of Bishop Wearmouth*, *H.* 4 *W.* 4. Page 942

APPORTIONMENT OF RENT.

See LEASE, 2.

APPURTENANCES.

See WAY.

ARBITRAMENT.

See STOPPAGE IN TRANSITU, 2.

1. A replevin suit, and all matters in difference touching the distress, were referred to arbitration; the costs of the suit to abide the event. The arbitrator awarded, that the rent was 14*l.*, and that 6*l.* were due for rent at the time of the distress; that the plaintiff in replevin should pay the defendant 6*l.*, and that the action should be no further prosecuted. It did not appear for what rent the defendant had avowed:

Held, that the award did not shew who ought to pay the costs, which were to abide the event of

the suit; and, consequently, that it was not final. *In the matter of Arbitration between Leeming and Fearnley, T. 3 W. 4.* Page 403

2. A party to an arbitration cannot object to the award, that the arbitrators chose an umpire by lot, if he expressly agreed to, or acquiesced in, that mode of choice.

Where a submission to arbitration under seal, has been varied by indorsing on it a new agreement (as, for changing one of the arbitrators,) to which both the principal parties have expressly assented, one of those parties cannot afterwards move to have the award set aside on the ground that the indorsement was not under seal.

An umpire, being furnished by the arbitrators with the evidence taken before them, and having himself viewed the premises, the condition of which was in question, made his award without calling for further evidence, or giving any notice on that subject to the parties: Held, that the award could not be objected to on that ground by a party who knew that the case had gone before the umpire, and made no application to him to hear further evidence. *In the matter of Arbitration between Tunno and Bird, M. 4 W. 4.* 488

3. On a reference of a cause and all matters in difference by a Judge's order, one of the parties moved, after the proper time, to set the award aside: Held, no excuse for the delay, that the arbitrator made an exorbitant charge for the award, in consequence of which the party now applying did not take it up.

An award is published when the arbitrator gives the parties notice that it may be had on payment of his charges; whether they be reasonable or not. *Macarthur v. Campbell, M. 4 W. 4.* 518

4. No precise form of words is n cessary to constitute an awar it is sufficient if the arbitrator e press by it a decision upon t matter submitted to him. B where an arbitrator, to whom dispute between an architect a his clerk, respecting a claim l the latter to wages, was referre stated in a letter that he had e amined drawings made by t clerk, with an account of his tim which did not shew experience ability to the extent to justify demand for remuneration und the circumstances; but in co sideration of the clerk's servic out of the office on some occ sions, and to meet the case in liberal manner, he proposed th the architect should pay the cle 10*l.*:

Held that the latter part the letter was a mere suggestio of the arbitrator and not a decide opinion that the clerk was or wa not entitled to recover 10*l.*, an therefore not a good award. *Lo v. Vulliamy, M. 4 W. 4.* Page 60

ARREST.

1. By the 32 *G.* 2. *c.* 28. *s.* 1., it i enacted that no sheriff's office shall carry any person arrested b him to gaol within twenty-fou hours from the time of such arrest unless such person shall refuse t be carried to some safe and convenient dwelling-house of his own nomination or appointment; and by *s.* 12. a penalty is imposed on any officer offending against the act:

Held, in an action brought for the penalty, for taking a party to gaol within twenty-four hours, contrary to the statute, that the officer who made the arrest ought to have required the party arrested to nominate some convenient dwelling-house to be taken to; for the latter

latter could not be said to have *refused* till the proposal had been made, and a mere omission by him to nominate a place did not justify carrying him immediately to gaol. *Simpson* v. *Renton*, *T.* 3 *W.* 4. Page 35

2. Plaintiffs having obtained a verdict against defendant under an award, in a cause in K. B., the Court of Chancery, upon bill filed, and matter appearing on the award itself, granted an injunction to stay further proceedings. Plaintiffs nevert hles signed judgment, and took defendant in execution. On application to this court for a rule nisi to discharge the defendant out of custody, (it being stated amongst other things, that the plaintiffs could not be met with for the purpose of attaching them by process out of Chancery,) this Court refused to interfere. *Foreman & Lloyd* v. *Jeyes*, *M.* 4 *W.* 4. 835

3. A person having made a motion in a cause to which he was a party, left the court, and in his way home called at an office where he kept his papers, but did not reside, to refresh himself and sort his papers: he remained there between one and two hours, and then left the office, and went into a tailor's shop in the same street, intending, however, to proceed home immediately, and being on his way thither when he so deviated. As soon as he entered the shop, he was arrested by a sheriff's officer, who had watched him from the court:

Held that the privilege of the party, redeundo from the court, had not ceased when he was arrested, and that he was entitled to be discharged. *Pitt* v. *Coomes*, *H.* 4 *W.* 4. 1079

ASSUMPSIT.

See LIEN.

1. Defendant was office-keeper of an *Exeter* and *London* coach, and servant to *C.*, a proprietor at *Exeter*, where the office kept by the defendant was. Defendant from time to time made up accounts of the shares of profits due to the several proprietors, and sent them to those parties, taking the money from a balance of *C.*'s which he had in hand. On one occasion defendant sent to plaintiff, a proprietor, a packet purporting to contain 23*l.*, which was due to him, but in reality containing 20*l.* only. Plaintiff sued defendant for 3*l.* had and received to his use:

Held that defendant was not liable, there being no privity of contract between him and the plaintiff; and that he was not precluded from this defence by having told the plaintiff (after action brought) that he, defendant, had had the 23*l.* of *C.* and sent it to the plaintiff, and debited *C.* with it. *Howell* v. *Batt*, *M.* 4 *W.* 4. Page 504

2. A brewer, who delivered beer to be used in a particular public-house on the credit of a person, not the licensed keeper of the house, may maintain an action against the latter for goods sold and delivered. *Brooker* v. *Wood*, *H.* 4 *W.* 4. 1052

ATTAINDER OF FELONY.

See EJECTMENT, 1. LEASE 6.

ATTORNEY.

See EVIDENCE, 3. LIEN. PRACTICE, 11.

1. Where an attorney, defendant in assumpsit, sets off the amount of

his bill, the plaintiff cannot deduct from that set off costs of taxation allowed against the attorney, pursuant to 2 *G.* 4. *c.* 23. *s.* 23. *Field* v. *Bezant Gt. one*, &c., *T.* 3 *W.* 4. Page 357

2. The Court of King's Bench does not exercise any common law jurisdiction in taxing attornies' bills.

The court, in the exercise of its statutory jurisdiction, refused to order an attorney's bill to be taxed at the instance of a third person, where the client had before admitted the amount to be due and declined taxing the bill; such client having since become bankrupt, and the application being made for the purpose of reducing his claim so as to prevent his being a good petitioning creditor. *Clutterbuck* v. *Combes*, *T.* 3 *W.* 4. 400

3. The Court of King's Bench will not grant a rule calling on an attorney to shew cause why he should not be struck of the roll, if the affidavits in support off the rule state an offence for which he would be liable to indictment. Anonymous *H.* 4 *W.* 4. 1089

AWARD.

See ARBITRAMENT, 1, 2, 3, 4.

BAIL.

See PRACTICE, 2.

BANKER.

1. *V.* and Co. bankers, were assignees of a judgment obtained in *Scotland* against *M. H.* for 4100*l.* In 1829 *M. H.* deposited with *V.* and Co. 4100*l.*, and by a memorandum in writing it was agreed that that sum should be deposited in their hands for safe custody, on account of *M. H.*, and that *from the time such deposit should be made and during its continuance* *V.* and Co. were not to pay any interest thereon, and all interest should cease in respect of the amount due upon the judgment. *M. H.* afterwards became bankrupt, and his assignees on the 12th of *Nov.* 1831, demanded from *V.* and Co. the 4100*l.*, which they refused to pay: Held, that they were not liable to pay interest on that sum from the time when payment of the principal was demanded. *Edwards* v. *Vere*, *T.* 3 *W.* 4. Page 282

2. Where a person lends money nominally on his own account, but really on account of another, the real lender cannot recover the money unless he prove distinctly that the loan was in reality intended to be his and was received as such. And therefore where *A.* as the managing owner of a vessel, was permitted by the other owners to have the possession of two warrants or orders of the *East India* Company, to pay to the said owners or bearer the sum of money therein mentioned, for freight; and *A.* deposited these warrants in the hands of his bankers, and they received the money due on them, and gave him credit for it on account: it was held on assumpsit brought after *A.*'s death by the surviving part owners against the bankers, that on proof of the above facts, they could not recover the money because it was not shewn that the loan was upon their account, for the fact of the warrants being the property of all the part owners, when placed in the bankers' hands was, upon the evidence, consistent with the supposition that the loan of the proceeds to the bankers was *A.*'s loan. *Sims* v. *Bond and another*, *T.* 3 *W.* 4. 389

BANK-

BANKRUPT.

See STOPPAGE IN TRANSITU, 2.

1. A steam engine erected for the purpose of working a colliery to be used by the lessee of such colliery during his term, but to be held as the property of the landlord subject to such use, will not pass to the assignees of the tenant on his bankruptcy, for it does not come within the description of "goods and chattels," in the 6 *G.* 4. *c.* 16. *s.* 72. nor had the bankrupt the actual or apparent ownership. *Coombs and another* v. *Beaumont, T.* 3 *W.* 4. Page 72
2. A party who seeks to avoid a payment, or transfer of goods, on the ground that it was voluntarily made by a trader in contemplation of bankruptcy, must shew, not merely that the trader was insolvent when it was made, but also that he then contemplated *bankruptcy. Morgan* v. *Brundrett, Gt. one, &c. T.* 3 *W.* 4. 289
3. *R. C.* borrowed a sum of money and gave the lenders a bond, by which he and four others bound themselves jointly and severally in a penalty, for the regular payment of interest, and for the discharge of the principal, and all interest which might be due at the end of five years, or, if sooner called upon, then at twenty-one days after demand. One of the co-obligors of *R. C.* became bankrupt, and obtained his certificate. At the time of the bankruptcy, a forfeiture had accrued by non-payment of interest, but it was not insisted upon, and the interest was subsequently paid up. After the certificate, *R. C.* was called upon for the principal but did not pay, and payment was enforced from the four co-obligors who had continued solvent. In an action by one of them against the party who had been bankrupt for contribution: Held that they could not have proved under the commission by *s.* 52. of the bankrupt act, and, therefore, that the certificate was no answer to the action. *Clements* v. *Langley, T.* 3 *W.* 4. Page 372
4. The bankrupt act, 6 *G.* 4. *c.* 16. *s.* 72., vests in the assignees such goods whereof the bankrupt was reputed owner at the time when he became bankrupt, by the consent and permission of the true owner. But where the true owner had permitted his goods to remain in the order and disposition of *A.* until the day before he became bankrupt, and then demanded the possession of them, which *A.* refused to deliver: Held, that they did not pass to *A.*'s assignees. *Smith* v. *Topping, M.* 4 *W.* 4. 674

BARON AND FEME.

See FEME COVERT.

BEER, SALE OF, BY RETAIL.

See CUSTOM, 1.

BILL OF EXCHANGE.

See STAMP, 1.

1. In an action by drawer against acceptor of a bill of exchange for 101*l.* defendant proved that he was under age when he accepted the bill. Plaintiff then produced in evidence a letter in the defendant's handwriting, purporting by its date to have been written after he came of age, addressed to a third person in these words: "I request you pay to *H.*" (plaintiff) "101*l.* at your earliest convenience, after the date of this letter, from the money left me by my late grandfather, for which I have given my bill." This

This letter was proved to have been delivered to the plaintiff's clerk, but it did not appear when. Held, that the letter must, primâ facie, be taken to have been written and issued at the time when it bore date; and that having been written after defendant came of age, and before the bill became due, it would support a count on a promise to pay according to the tenor and effect of the bill. *Hunt* v. *Massey, H.* 4 *W.* 4. Page 902

2. In an action by the the indorsee against the drawer of an accommodation bill, which had been fraudulently disposed of by the first indorsee, and afterwards discounted by the plaintiff, it is no defence that the plaintiff took the bill under circumstances which ought to have excited the suspicion of a prudent man that it had not been fairly obtained: the defendant must show that the plaintiff was guilty of gross negligence. *Crook* v. *Jadis, H.* 4 *W.* 4. 909

3. To an action by an indorsee against the indorser of a bill of exchange who had lost the bill by accident it is a good defence that the plaintiff took the bill fraudulently, or under such circumstances that he must have known that the party from whom he took it had no title, or that he was guilty of gross negligence in taking it; but it is no defence that he took it under such circumstances that a prudent cautious man would not have taken it. *Backhouse* v. *Harrison, H.* 4 *W.* 4. 1099

BILL OF LADING.

See FREIGHT. STOPPAGE IN TRANSITU, 2.

BILL OF MIDDLESEX.

See PRACTICE, 6.

BOND.

1. On a bond with a penalty, conditioned for the payment of money at a given day, and interest in the mean time, with a stipulation that on any default in paying the interest, the whole sum should be demandable; the obligee, on the interest falling into arrear, brought an action to recover the whole principal and interest: Held, that the case was not within 8 and 9 *W.* 3. *c.* 11. *s.* 8., and therefore that the plaintiff was entitled after verdict to have judgment and execution for the whole principal sum, and not merely for the arrears of interest. *James* v. *Thomas, T.* 3 *W.* 4. Page 40

2. An action on a bond, conditioned generally for payment of a specified sum with interest, may be brought without a demand being made. *Gibbs* v. *Southam, H.* 4 *W.* 4. 911

3. Debt on bond. The condition, after reciting that the obligor was about to marry with *A.* a widow, and thereby to become possessed of a stock in trade, and that it was agreed that he should execute a bond to pay to the children of *A.* by her late husband 300*l.* within twelve months after her death in the event thereinafter specified. was that, "if the obligor should within twelve months after the decease of *A.* pay to her children 300*l.*, *if, upon an account taken, the stock in trade and effects in the business* (*if then carried on by the obligor*) should amount to 400*l.*: but in case upon such account to be taken, the stock in trade should amount to less than 400*l.*, then if if the obligor should pay to the children of *A.* 120*l.*, the bond should be void."

Plea, that long before the death of *A.*, the obligor retired from and ceased

ceased to carry on the trade, and that at the death of *A.* he had not any stock in trade, and that no account of the said stock in trade in the condition mentioned was or could be taken at the time of the death of *A.*, or from thence hitherto: Held on demurrer that the true construction of the condition of the bond was, that the obligor had an option to continue or discontinue the trade during the life of *A.*; and that he having discontinued it, the event on which the money was to come to the children of *A.* had never happened; and that the plea therefore was good. *Beswick* v. *Swindells*, *H.* 4 *W.* 4. Page 914

BREWER.

See ASSUMPSIT, 2.

BRIDGE.

Before the statute 43 *G.* 3. *c.* 59. there had been a public county bridge, which was of wood, resting on stone abutments. After that statute passed, the wooden part of the bridge was, during a flood, carried some distance down the river, but the stone abutments remained. Part of the wooden materials being afterwards collected together, were, with new materials formed into the upper part of a bridge, which was wider than it had been before the flood, and placed upon the old abutments. This was done at the expence of the parish, and not under the direction of the county surveyor: Held, that this was not a bridge erected or built after the passing of 43 *G.* 3. *c.* 59. *s.* 5.; and that the inhabitants of the county were bound to repair it. *The King* v. *The Inhabitants of the County of Devon*, *T.* 3 *W.* 4. 383

BROKER.

See INSURANCE BROKER.

BUILDING.

See INDICTMENT, 3.

BURGESS.

See CUSTOM, 1, 2.

BUTTER, SALE OF.

See VENDOR AND VENDEE, 1.

CANAL ACT.

1. By acts of parliament enabling a company to make and maintain a canal navigation, and to take lands for that purpose making satisfaction, it was provided that the company should not take any garden ground without consent of the respective owners and occupiers, and that any action to be brought for any thing done *in pursuance of those* acts, should be commenced within *six calendar months next after the fact should have been committed;* or if there should be a continuance of damages, then within six calendar months next after the committing of such damage should have ceased.

The company wishing to take garden ground for the purpose of sloping the banks of the canal, told the occupier, or tenant, that they had obtained the consent of the owner's agent, without which the tenant would not have given them permission; but the statement was not true. They then paid him a sum which he demanded on account of a former transaction, after which they entered and sloped away the ground. The land in consequence was from thence-

thenceforth overflowed by the *Thames* at every high tide. For this damage the landlord sued the company more than six calendar months after the ground was taken, and the tide was let in:

Held, that the injury was one for which an action should have been brought within six months from the taking away of the land; and that the defendants were within the protection of the limiting clause, inasmuch as the act complained of was really done for the purpose contemplated by the statutes, though in the prosecution of that purpose the defendants had been guilty of a misrepresentation and of bad faith towards the occupier. *Lord Oakley* v. *The Kensington Canal Company, T.* 3 *W.* 4. Page 138

2. A river navigation act directed that the salary of the clerk to the commissioners should be paid by the proprietors of the tolls. A person seised in fee of a part of the navigation and tolls, granted annuities, and conveyed her part of the tolls to a trustee, to secure the annuities, and to permit her to hold the conveyed premises and the profits thereof to her own use, till default in payment of such annuities. By a subsequent deed she conveyed the premises in fee to *Y.* together with other property, in trust to sell as in the deed was directed, and to receive the proceeds of such sale, and the tolls and profits of the navigation; and out of the several receipts and profits to defray *the costs and expences necessary for carrying the trusts into effect*, to pay up, and if possible discharge the annuities, to pay off certain creditors and to hold the surplus, if any, for her benefit.

The trustee under the last mentioned deed entered into receipt [illegible]lls, appointed a collector and represented himself t[illegible] commissioners as a mortag[illegible] the tolls, and as having a c[illegible] over them and over the rep[illegible] the navigation, but refused t[illegible] the salary of the clerk. Th[illegible] nuities were still subsisting. [illegible] clerk sued the trustee for [illegible] payment of his salary:

Held, that it lay upon the [illegible] tee having conducted hims[illegible] above stated, to shew that h[illegible] not a proprietor within the [illegible] ing of the act: Held furth[illegible] on reference to the several [illegible] that he was such proprieto[illegible] though he only held the to[illegible] trust to pay creditors an[illegible] charge incumbrances, and alt[illegible] there was a legal estate out[illegible] ing in a trustee, to secure t[illegible] nuities.

The act, passed in 179[illegible] quired that certain notices [illegible] be given in the *Northampto[illegible]* *Cambridge* newspapers. [illegible] was at that time one news[illegible] published at each place. A [illegible] paper was subsequently establ[illegible] called *The Huntingdon, Be[illegible]* *and Peterborough Gazette, [illegible]* *Cambridge and Hertford Inde[illegible]* *ent Press;* and it was publ[illegible] (among other places) at [illegible] *bridge:* Held, that publicati[illegible] the notices in the former p[illegible] was sufficient. *Tibbits, Gent.* *&c.* v. *Yorke, M.* 4 *W.* 4. Pag[illegible]

CAPIAS.

See PRACTICE, 12.

CERTIFICATE.

See BANKRUPT, 3.

CERTIORARI.

See INDICTMENT, 1. SESSIO[illegible]

CHEL[illegible]

CHELSEA WATER WORKS' COMPANY.

See POOR RATE.

CLERK TO COMMISSIONERS OF NAVIGABLE CANAL.

See CANAL ACT, 2.

CLERK TO TRUSTEES UNDER A TURNPIKE ACT.

See MANDAMUS, 2.

CLOSES IN WHICH, &c.

See PLEADING, 3.

COAL MINES, RATEABILITY OF.

See INCLOSURE ACT, 2.

COMMENCEMENT OF RISK.

See INSURANCE, 2.

CONDITION.

See BOND, 1, 2, 3.

CONDITION PRECEDENT.

See LEASE, 3.

CONVICTION.

See JUSTICES, 1.

COPARCENER.

See LIVERY OF SEISIN.

COPYHOLD.

1. Copyholds are within the statute 27 *Eliz. c.* 4. which avoids all conveyances of any lands, tenements, or hereditaments, made for the intent and of purpose to defraud and deceive persons that shall afterwards purchase the same. *Doe d. Tunstill* v. *Bottriell, T.* 3 *W.* 4. Page 131

2. A copyholder in fee surrendered to the use of another person and afterwards and before the admittance of the surrenderee, committed and was convicted of simple felony: there being a custom in the manor that any tenant of customary tenements who should commit and be convicted of felony, should forfeit his said tenements to the lord: Held, that the surrenderor before admittance was still tenant for the purpose of forfeiture, and that his estate was forfeited to the lord, and the surrenderee not entitled to be admitted. *The King* v. *Lady Jane St. John Mildmay, T.* 3 *W.* 4. 254

3. At a court baron, held in 1812, before the steward of a manor, two copyhold tenements were granted to *W. R.* and *J. H.*, habendum for their lives and the life of the longest liver of them successively at the will of the lord according to the custom of the manor, at the yearly rents of 26*s.* 4*d.* and 7*s.* all services therefore due, and a heriot when it should happen, and the said *W. R.* was admitted tenant; but the admission and fealty of *J. H.* were respited until, &c.

In 1823 the lessees of the manor by deed appointed *C. L.* steward of the manor, with full power to hold courts baron and customary courts, and to do all acts usual to be done by stewards in relation there-

thereunto; and they more especially authorised him to make any voluntary grants of customary or copyhold lands within or parcel of the manor, and to give licences to demise, or otherwise, as he the said *C. L.* should think fit, and either in or out of court as fully as the lessees might or could do.

At a court baron held *out of the manor* in 1825, *J. H.* (who survived *W. R.*) surrendered to the lords lessees the above mentioned copyhold messuages, and the lessees by *C.L.* their steward granted them again to *W. H. L.* and *J. W. W.* habendum for their lives, and the life of the longest liver of them successively, according to the custom of the manor, at the yearly rent of 26*s.* 4*d.* and 7*s.* and all services therefore due, and a heriot for *each of the said tenements* when it should happen, according to the custom of the manor; and *J. H. L.* and *J. W. W.* were admitted tenants:

Held, that it was no objection to this grant that *J. H.* the surviving life under the grant of 1812 was never admitted tenant: nor that two rents were reserved, without distinguishing how much was payable for each tenement the same rents having been reserved by a former grant in 1771: nor that a heriot was reserved for each tenement when it should happen, according to the custom of the manor; for if a heriot was not demandable for each tenement, the claim could not be enforced; but that would not avoid the grant:

Held, secondly, that a customary court cannot be held out of the manor unless there be a custom to warrant it; and if one be held out of it without such custom, it is void, and such things there done, as are required to be done at a court, such as presentments by the homage, imposing fines, levying fines, and suffering recoveries, are void:

But thirdly, that as the lord may grant to or admit a copyhold tenant, not only out of court, but also out of the manor, the grant of 1825, if it had been made by the lord, would have been good, though it purported to have been made at a void court:

Held, fourthly, that a steward cannot in his mere character of steward admit a copyhold tenant out of the manor.

Fifthly, that as *C. L.* by the deed of 1823 had a special authority to make any voluntary grants, either in or out of court, as fully as the lessees of the manor could do, he might take the surrender, and make the grant in question out of the manor; and that although he professed in making the grant, to act only as steward and not as the special agent of the lord, the grant so made might operate as a grant made by the lord's attorney, and was therefore valid.

Sixthly, that although, in general, to make a party tenant by copy of court roll, his admission ought to be notified, for the information of the tenants, at the next or some other court, and a regular entry of it made by certificate, presentment, &c.; yet, as the proceedings at this void court were entered by the steward on the court rolls, as if done at a valid court, the tenants must, at a following court, after the admittance, have had information of what had been done, and that was sufficient. *Doe dem. Leach and Another* v. *Whitaker*, *T.* 3 *W.* 4.

Page 409

4. If a copyholder pull down a barn, without any intention of rebuilding, the lord cannot recover the place from him, on the ground of a forfeiture, if the jury find that the premises are not damaged.

Doe

Doe dem. Grubb v. *The Earl of Burlington, M.* 4 *W.* 4. Page 507

5. *A.* and *B.* by a settlement made on occasion of their intended marriage (which afterwards took place) conveyed certain freehold estates to trustees, for the benefit of themselves and the survivor of them for life, then for the benefit of the issue of the marriage, if any, and if none, then to the use of such person as the wife by deed or last will, *notwithstanding her coverture, and as if she was sole and unmarried*, should appoint, and in default of appointment to the use of herself in fee. The wife at the time of the marriage was seised in tail of certain copyhold lands.

The husband and wife afterwards executed a power of attorney to *C.*, authorising him to surrender the copyhold lands of which the wife was seised in tail to a third person, in order to make him tenant to the præcipe or plaint in a recovery intended to be suffered in the manor court. The wife, previous to her executing the power of attorney, was examined apart from her husband, by the deputy steward of the manor. The recovery was suffered, and immediately afterwards the premises were surrendered to the same uses as those mentioned in the marriage settlement: Held, that the power of attorney was valid as the act of the husband; he having sufficient interest in his wife's copyhold lands to pass them by surrender during the joint lives of himself and his wife; and that the recovery (which had stood unreversed for twenty years) was therefore well suffered.

After the above surrender, the wife was admitted to other copyhold lands, which were not surrendered to the use of her will. By her will, made in 1802, she devised her real and leasehold estates to certain persons therein named. At the date of her will and of her death she was seised of freehold estates: Held, that the will was a valid disposition of the copyhold which had been surrendered to the use of her will, though it did not refer to the surrender in which the right of disposition was reserved, and though it was made after she ceased to be a feme covert:

Held further, that the copyholds which had not been surrendered to the use of the will, did not pass by the general devise of the real estate, the will having been made before the 55 *G.* 3. *c.* 192. *Doe dem. Smith* v. *Bird and Another, M.* 4 *W.* 4. Page 695

CORONERS.

The court on the application of the crown, set aside a coroner's inquisition, for defects apparent on the face of it. Rule absolute in the first instance. *In the Matter of Culley, T.* 3 *W.* 4. 230

CORPORATE OFFICER.

See MANDAMUS.

CORPORATION.

See QUO WARRANTO.

In an action against a corporation on a bond, the condition of which recited, that the company were, by act of parliament, authorised to raise money by bond, and that at a general assembly of the company of proprietors, it had been resolved that the bond in question should be issued for that purpose, the defendants pleaded non est factum: Held, that although the company could not, under that plea, shew that the bond executed by

by them was invalidated by collateral matters, they might shew that it was void, because it was executed contrary to the provisions of the act of parliament:

Held, secondly, that a clause in the act of parliament, whereby the company were authorised, at any general or special general assembly, to order and dispose of the custody of their common seal, and the use and application thereof, empowered them to make rules and regulations for its custody, but did not require their concurrence in each particular act of sealing, and that a bond to which the seal had been affixed by the company's clerk, under a general authority from the directors, was valid.

By another clause it was enacted, that the clerk should, in a book provided by the company, keep an account of all acts, proceedings, and transactions of the company of proprietors, and that every proprietor should have liberty to inspect the same, and take copies of the entries: Held, that entries of the proceedings in the book so kept by the clerk were not admissible in evidence, against one of their own members suing them. *Hill* v. *The Manchester and Salford Water Works' Company, M.* 4 *W.* 4. Page 866

COSTS.

See ATTORNEY, 1, 2. EJECTMENT, 2, 3. INDICTMENT, 2. MANDAMUS, 8. PRACTICE, 5. 7, 8, 12. PROHIBITION, 1. SLANDER, 2.

CO-SURETY.

See BANKRUPT, 3.

COURT.

See COPYHOLD, 3.

COURT MARTIAL.

See PROHIBITION, 2.

COVENANT.

See LEASE, 3. 5. PLEADING, 5.

Declaration stated that by indenture between defendant and *J. W.*, reciting that defendant for certain considerations had agreed to pay off certain mortgages and debts of *J. W.*, defendant covenanted to and with *J. W.* to save, protect, defend, keep harmless, and indemnify *J. W.* his heirs, executors, administrators, &c., from the payment of the said debts, and from all actions, &c. in respect of them. Breach, that 500*l.* of an annuity for payment of which *J. W.* had bound himself, his heirs, executors, and administrators, became in arrear, and remained so after *J. W.*'s death, and that defendant did not pay the same, nor protect or indemnify *J. W.*, his executors, administrators, &c. by reason whereof the annuity bond became forfeited, and the grantee recovered against the plaintiff, administratrix of *J. W.*, and had judgment for 20*l.*, the amount of assets admitted to be in hand, and for the residue, judgment of assets quando: Held, that looking to the whole of the deed declared upon, there appeared a covenant by the defendant, not only to indemnify, but to pay the debt.

Semble, per *Parke* J. and held by *Patteson* J. that if the express covenant to protect and indemnify had stood alone, a sufficient breach of that covenant appeared (*Littledale* J. dubitante): Held, that the plaintiff might recover the whole arrears, for which she was liable, as administratrix, to the grantee of the annuity, though she had only

only paid a part. *Carr* v. *Roberts*, *T.* 3 *W.* 4. Page 78

COVENANT TO STAND SEISED TO USES.

See MARRIAGE SETTLEMENT.

CRIMINAL INFORMATION.

See JUSTICES, 2.

CURATE.

See SETTLEMENT BY RENTING A TENEMENT, 4.

CUSTOM.

1. The statute 11 *G.* 4. and 1 *W.* 4. *c.* 64., for permitting the general sale of beer by retail in *England*, does not supersede the custom of a borough, that no person shall carry on the trade of an alehouse-keeper therein who is not a burgess. *Mayor, &c. of Leicester* v. *Burgess*, *T.* 3 *W.* 4. 246
2. A custom for the jurors of a court leet holden for a borough and manor, to present persons to be admitted burgesses of the borough, and for the persons so presented to be admitted and sworn in burgesses, was held, on motion in arrest of judgment, to be valid in law. *The King* v. *The Duke of Beaufort*, *T.* 3 *W.* 4. 442

CUSTOMARY COURT.

See COPYHOLD, 3.

DEATH, PRESUMPTION OF.

See EVIDENCE, 1.

DECEIT.

See ACTION ON THE CASE, 2.

DEED.

See CANAL ACT, 2. MARRIAGE SETTLEMENT. WAY.

Mortgagor granted, bargained, sold, released, and confirmed to mortgagee (in his possession then being by a previous bargain and sale) an iron-foundery and two dwelling-houses, &c. and the appurtenances; *together with all grates, boilers, bells, and other fixtures* in and about *the said two dwelling-houses;*" and all trees, houses, cottages, commons, &c. easements, profits, &c. to the said foundery, messuages, and lands appertaining. There were cranes, presses, a steam engine, and other fixtures in the foundery, used for the purposes of the business carried on there, and valued at 600*l.*: Held, that the specification of the grates and other fixtures in and about the dwelling-houses, shewed that those in the foundery were not intended to pass, though they would have passed if the others had not been mentioned.

Plaintiff at the trial produced a deed of mortgage, executed to him by defendant. The latter proved that on executing it he handed it to his own agent, intending it, as he alleged, to remain as an escrow, till the performance of a certain agreement by another party to the mortgage: Held, that the possession of it by the plaintiff was primâ facie evidence that it had been delivered to him as a deed. *Hare* v. *Horton*, *M.* 4 *W.* 4. Page 715

DEPOSIT.

See BANKER, 1, 2.

DEVISE.

See COPYHOLD, 5.

1. Testator devises as follows: "As touching my worldly estate, I give, devise, and dispose of the same in the following manner: first, I give to my wife, *Ann, the whole of my estates*, goods and chattels, living stock, and debts, during her widowhood, and no longer, but demeatly to go to my dear children, *as I have appointed and disposed to them in lots and money.*" He then, after giving to his eldest son a sum of money, left to his second son a lot of land (therein described) to him and his lawful heirs for ever; and if no heirs, to his next brother and his lawful heirs for ever. Then followed four other devises in similar terms to four other sons, and then he *gave to his son John a dwelling-house, and piece of ground, &c; also his goods and living stock.* He then devised to his daughter a house and gardens, and to her son and his lawful heirs for ever: Held that *John* took a life estate only in the house and ground devised to him. *Doe. d. Gwillim* v. *Gwillim, T.* 3 *W* 4. Page 122

2. Lands were devised, to the use, among others, that *M. A. F.* should take *from and out of the same premises an annuity* or yearly rent charge of 500*l.* a year, to be paid *clear of all taxes and deductions*, remainder to *S.* for life, subject to the annuity: Held that the annuity was to be paid clear of legacy duty, and was a charge upon the land; and consequently that *S.* who had entered into possession under the devise to him, and been compelled to pay the legacy duty on the annuity pursuant to the 45 *G.* 3. *c.* 28, *s.* 5. could not recover it again from the annuitant. *Stow* v. *Davenport, T.* 3 *W.* 4. Page 359

3. Testator being seised in fee of lands, devised to trustees in fee, upon trust, as to part, to permit his eldest son to receive the profits for life, and as to other parts to permit his two daughters to receive the profits for life; and also upon trust, during the lives of his said children, to preserve contingent remainders.

And after the decease of any or either of his said children, he devised the estate to him or them limited for life as aforesaid, unto all and every his, her, or their child or children living at the time of his, her, or their parents' decease, or born in due time afterwards, for their lives as tenants in common; but, nevertheless, with an equal benefit of survivorship among the rest of the said children, if more than one, and any of them should die without leaving issue, the child or children of each of his said sons and daughters taking the rents and profits of his, her, or their parent's estate only.

And from and after the decease of all the children of *each* of his said sons and daughters *without issue*, he devised the estates to them respectively limited as aforesaid, unto and among all and every *the lawful issue of such child or children* (during their lives) as tenants in common, and to descend in like manner to *the issue of his said sons and daughters respectively*, so long as there should be any stock or offspring remaining:

And *for default or in failure of issue of any of his said sons and daughters*, he devised the estates so limited to him, her, or them dying *without issue*, unto the survivors of his said sons and daughters, during their respective lives, in equal shares as tenants in common; and after their respective deaths,

deaths, he devised the same to the children of the survivor of his said sons and daughters, during their respective lives, as tenants in common, with such benefit of survivorship as aforesaid; and after the decease of all of them, to the issue of such children, in like manner as he had before devised the original estate of each of his said sons and daughters.

And for default or in failure of issue of all his said sons and daughters except one, he devised all his said estates unto his only surviving son or daughter in fee:

Held that under this will, the eldest son of the testator did not take an estate tail (unless in remainder) but an estate for life; that his children took estates tail in undivided shares as tenants in common.

The doctrine that, in construing a devise, the general intent is to be preferred to the particular intent, is incorrect and vague; the true rule of construction is, that technical words, or words of known legal import, must have their legal effect, even though the testator use inconsistent words; unless the inconsistent words are of such a nature as to make it clear that the technical words are not used in their proper sense. *Doe dem.* of *J. A. Gallini* v. *F. A. Gallini, M.* 4 *W.* 4. Page 621

4. *A.* devised copyhold lands to his son *D. S.* and his wife, and *J. H.* and his wife, or the survivor of them, for their lives; and after the decease of all of them, to the male heir at law of him the testator, his heirs and assigns for ever; he then bequeathed legacies to three other sons, and afterwards died leaving five sons and one daughter, three by his first wife, and three by the second: Held that the fee vested at the testator's death, in the person who was then his male heir at law, and did not remain contingent until the determination of the life-estates. *Doe dem. Pilkington* v. *Spratt. M.* 4 *W.* 4. Page 731

DISTRESS.

The 1 & 2 *Phi.* and *M. c.* 12. *s.* 2., which enacts, "that no person shall take for keeping in pound, impounding, or poundage of any distress, above 4*d.* for any one whole distress that shall be so impounded," does not extend to cases where the goods are impounded *on* the premises, by virtue of the 11 *G.* 2. *c.* 19. *s.* 10. *Child* v. *Chamberlain, Bond, Jessopp, & Others, H.* 4 *W.* 4. 1049

DIVISIBLE ALLEGATION.

See PLEADING, 3.

EASEMENT.

See WAY.

ECCLESIASTICAL COURT.

See PROHIBITION, 1.

EJECTMENT.

1. Ejectment may be maintained for freehold lands on the demise of a person attainted of felony, when there has been no office found on behalf of the king. *Doe dem. Griffith,* v. *Pritchard, M.* 4 *W.* 4. 765

2. In a second action of ejectment brought for the same premises, the Court will stay proceedings till the costs of the former are paid, although the former action was discontinued before consent rule, or

or plea. *Doe dem. Langdon* v. *Langdon, M.* 4 *W.* 4. Page 864

3. *A.* having brought an ejectment had judgment of nonsuit against him; afterwards he was discharged under the Insolvent Debtor's Act, the costs of the ejectment being inserted as a debt in his schedule. The assignee of his estate having brought a second ejectment upon the insolvent's original title, the Court stayed the proceedings in it until the costs of the first were paid. *Doe dem. Standish* v. *Roe, M.* 4 *W.* 4. 878

4. In ejectment by landlord against tenant for a forfeiture, it is a good defence that the landlord, after the execution of the lease, conveyed away his title to the premises by mortgage; although it be not shown that any interest on the mortgage is in arrear, or that the mortgagee has made any claim, or otherwise enforced his rights as against either landlord or tenant. *Doe dem. Marriott* v. *Edwards, H.* 4 *W.* 4. 1065

ELECTION OF CORPORATE OFFICER.

See Quo Warranto.

EMBLEMENTS.

Tenant for a term determinable upon a life sowed the land in spring, first with barley and soon after with clover. The life expired in the following summer. In the autumn, the tenant mowed the barley, together with a little of the clover plant which had sprung up. The clover so taken made the barley straw more valuable by being mixed with it; but the increase of the value did not compensate for the expence of cultivating the clover, and a farmer would not be repaid such expence in the autumn of the year in which it wa The reversioner came int session in the winter, and to crops of the same clove more than a year had elaps the sowing: Held that the was not entitled to emblem either of these two crop because emblements can be only in a crop of a specie ordinarily repays the lab which it is produced wit year in which that labour stowed; and secondly, b even if the plaintiff were to one crop of the ve growing at the time of th of his interest, this had b ready taken by him at the cutting the barley. *Gr Weld, T.* 3 *W.* 4. P

ENTRIES IN CORPORA BOOKS.

See Corporation.

ENTRY.

See Fine. Lease, 6.

ESCROW.

See Evidence, 5. Dee

ESTATE TAIL.

See Devise, 3.

EVIDENCE.

See Arbitrament, 2. Bill change, 1, 2. Corpor Frauds, Statute of, 1. 5. Pleading, 3, 4. 6. 8. tlement by Birth. 1. 3.

1. A person who has not bee of for seven years, is pres

be dead; but there is no legal presumption as to the time of his death. The fact of his having been alive or dead at any particular period during the seven years must be proved by the party relying on it. *Doe dem. Knight* v. *Nepean*, *Bart. T.* 3 *W.* 4. Page 86

2. In an action against executors for a debt of the testator, a person entitled to an annuity under the will is not disqualified by interest from giving evidence for the defendants. *Nowell* v. *Davies*, *T.* 3 *W.* 4. 368

3. A witness may be called upon by the plaintiff to state a conversation in which the defendant proposed a compromise to the plaintiff, although the witness attended on that occasion as attorney for the defendant. *Griffith Gent., One, &c.* v. *Davies*, *M.* 4 *W.* 4. 502

4. An order of sessions, quashing an order of removal generally, is conclusive evidence between the parties to the appeal that, when the order of removal was made, the appellant parish was not bound to receive the pauper, but it is only primâ facie evidence that the pauper was not settled in that parish; and therefore upon the trial of an appeal between the same parishes against a second order of removal of the same party, the removing parish may shew by parol evidence, that the first order of removal was quashed, on the ground that the pauper resided on a tenement of his own, which made him irremoveable, though it did not confer a settlement, and that he afterwards sold the tenement and thereby became removeable. *The King* v. *the Inhabitants of Wick, St. Lawrence*, *M.* 4 *W.* 4. 526

5. Plaintiff at the trial produced a deed of mortgage, executed to him by defendant. The latter proved, that on executing it he handed it to his own agent, intending it, as he alleged, to remain as an escrow, till the performance of a certain agreement by another party to the mortgage: Held, that the possession of it by plaintiff was primâ facie evidence that it had been delivered to him as a deed. *Hare* v. *Horton*, *M.* 4 *W.* 4. Page 715

6. A merchant at *Sydney* shipped goods for *England* on board the ship *C.*, and by another ship that sailed after her, wrote to an agent in *England*, and desired him if he received that letter before the *C.* arrived to wait thirty days, in order to give every chance for her arrival, and then effect an insurance on the goods. The letter was received, and the agent having waited more than thirty days, effected an insurance through the intervention of a broker, who told the underwriters when the *C.* sailed, and when the letter ordering the insurance was written, but did not state when it was received, nor the order to wait thirty days after the receipt of it, before effecting the insurance. The *C.* never arrived. The assured brought an action on the policy against the insurers, but failed, on account of the suppression of facts by the broker. In an action by the assured against the broker, for negligence in effecting the policy: Held that the evidence of underwriters and brokers was not admissible to shew, that in their opinion the matters not communicated were material. *Campbell* v. *Rickards*, *M.* 4 *W.* 4. 840

7. Five parish officers were appointed for a certain year, viz., two churchwardens, two overseers, and one vestry clerk and assistant overseer the terms of whose appointment did not appear. At their vestry-meetings for the relief of the poor, orders were given to the paupers upon a shopkeeper for goods,

goods, and sometimes for money to pay their monthly allowances; which orders the shopkeeper complied with. Three only of the officers ever signed such orders; the assistant overseer being one, signing sometimes by his name only, and sometimes as clerk, or overseer. All used to attend the board, and when called upon there to pay the shopkeeper for his goods and advances, had severally promised to do so when they could:

Held, that the shopkeeper, after the expiration of the year, might recover against all the parties both for the goods and the advances of money, if a jury were of opinion that they had all contracted with the plaintiff.

And, that it was not necessary to show by the appointment of the assistant overseer that he was authorised so to contract, the jury being satisfied that he had in fact bound himself to the plaintiff in respect of the goods and money supplied. *Kirby* v. *Banister*, *H.* 4 *W.* 4. Page 1070

8. Where an information for libel states certain transactions took place, and that the libel was published of and concerning them, and then sets out the libel as referring to them, and the prosecutor at the trial, gives general proof of such transactions to support the introductory part of his pleading the defendant is not thereby authorised to give evidence of the particular history of those transactions, so as to bring into issue the truth or faleshood of the libel.

But if such evidence be adduced bonâ fide to show that the transactions referred to in the alleged libel are not the same with those which the information supposes it to have had in view, and that the Judge is informed that the evidence is offered for that purpose, it is admissible.

Affidavits are not receivable to show that a judge is mistaken in his report of a cause tried before him. *The King* v. *Grant*, *H.* 4 *W.* 4. Page 1082

FALSE REPRESENTATION.

See ACTION ON THE CASE, 2.

FELONY.

See COPYHOLD, 2. LEASE, 6.

FEME COVERT.

See ORDER OF REMOVAL.

To a declaration against husband and wife for a debt due from the wife before coverture, the husband's discharge under the insolvent act is a good plea.

Quære, whether it can be replied that the wife had separate property. *Lockwood* v. *Salter*, *T.* 3 *W.* 4. 903

FEOFFMENT.

See LIVERY OF SEISIN.

FINE.

It is a sufficient entry to avoid a fine, if the party enters expressly to claim the premises as his own: it is not necessary for him to say that he enters to avoid all fines, or to specify what particular act, adverse to his own interest, he means to defeat *Doe dem. Jones* v. *Williams*, *M.* 4 *W.* 4. 783

FIXTURES.

See BANKRUPT, 1. DEED, 1. PLEADING, 4.

FORFEITURE.

See COPYHOLD, 4. LEASE, 6.

FRAUDS,

FRAUDS, STATUTE OF.

1. By agreement in writing, *A.* contracted to sell *B.* several lots of land and to make a good title to them: and a deposit was paid. It was afterwards discovered that a good title could not be made to one of the lots, and it was then verbally agreed between the parties, that the vendee should waive the title as to that lot. The vendor delivered possession of the whole of the lots to the vendee, which he accepted. In an action brought by the vendor to recover the remainder of the purchase money, the declaration stated that the defendant agreed to deduce a good title to all the lots except one, and that the vendee discharged and exonerated him from making out a good title to that lot and waived his right to require the same:

   Held, that oral testimony was not admissible to show the waiver of the vendee's right to a good title as to that lot, inasmuch as the effect of such waiver was to substitute a different contract for the one in writing; and by the statute of frauds, in every action brought to charge a person on a contract for the sale of lands, the agreement must be in writing. *Goss* v. *Lord Nugent, T.* 3 *W.* 4. Page 58

2. In an agreement in writing to pay the debt of another, the consideration must either be stated in express words or must be necessarily implied from the terms used. A letter, therefore, from the defendant to the plaintiff in the following words: "As you have a claim on my brother for 5*l.* 17*s.* for boots and shoes, I hereby undertake to pay you the amount within six weeks from this day, 14th *January*, 1833," was held not to satisfy the statute of frauds. *James* v. *Williams, H.* 4 *W.* 4. Page 1109

FREIGHT.

In indebitatus assumpsit for freight, it appeared that goods were laden in *Jamaica* on board the plaintiffs' ship, according to a bill of lading, which stated them to have been shipped by *W. J.* on a vessel bound for *London* on account of the defendant, and that they were to be delivered in *London* to the consignees, *paying freight for the same* at the rate therein mentioned; the goods so shipped were the property of the defendant. The captain having delivered the goods to the consignees without receiving the freight, it was held that the defendant was liable by law to pay the freight to the shipowners; and that independently of any express contract by charter-party. *Domett* v. *Beckford, M.* 4 *W.* 4. 521

GENERAL AND PARTICULAR INTENT.

See DEVISE, 3.

GOODS SOLD AND DELIVERED.

See ASSUMPSIT, 2.

GRANT.

See COPYHOLD, 3.

HERIOT.

See COPYHOLD, 3.

HIGHWAY.

1. The inhabitants of a parish are bound by law to repair all roads within it dedicated to and used by the public, although there be no adoption of such roads by the parish.

Where land is vested in fee in trustees for certain public purposes, they may dedicate the surface to the use of the public as a highway, provided such use be not inconsistent with the purposes for which the land is vested in them.

By an act for draining fen lands, commissioners were authorised to make drains and other works therein prescribed, and also to make a new cut or main drain as therein mentioned, and to dispose of all earth and soil arising from the drains directed to be made, in forming banks at certain distances on each side thereof, and the banks, drains, &c. were to remain under their control for the purposes of the act. The commissioners, under the powers of the act, made a drain according to the act, and with the earth taken from it made a bank on one side of it, of the average breadth of forty feet: this drain and bank were never part of the fen, but were old inclosed land, and bounded by old inclosures on both sides; and the land upon which they were respectively made, was purchased by the commissioners for the purposes of the act. The bank had been used for about twenty-five years as a public highway and was a convenient and useful road for the public.

Upon special case, stating these facts, it was held by *Denman* C. J. and *Parke* J. (*Littledale* J. dissentiente) that the dedication of this part of the bank as a road to the use of the public was not inconsistent with the purpo which the commissioners bound by the act to appl not appearing by the case however, ought to have bee express on these points, pe J.) that the cleansing of th or any other purpose of had been or was likely to b fered with by such user of *The King* v. *The Inhabi Leake, M.* 4 *W.* 4. P

2. The general turnpike act *c.* 95. *s.* 87. gives an appea sessions to any person w think himself aggrieved thing done by any two jus pursuance of that act, or a turnpike act; and declar the determination of the shall be final and conclus that no proceeding to be pursuance of that act sha moved by certiorari. The on appeal against a certi two justices, that a turnpi made under a local act h completed and was fit to b led upon, having decided certificate was void in poin and having refused to go merits of the appeal in fact, this Court refused to mandamus to them to h appeal, on the ground th decision was contrary to t act.

A local turnpike act reci the making and mainta new turnpike road from join the *Wakefield* and turnpike road at a certai and several branch roads also described) from and the said main turnpike roa be an advantage to the inh of *Leeds* and *Halifax*, an public in general; and it ised the making of the sai roads, and enacted "that new roads should not be ively opened to the pu

become public roads, until two justices should have certified that the said roads respectively, and the works thereon respectively, were completely made and fit to be travelled upon throughout the whole length of such roads respectively."

Semble, per *Littledale* and *Taunton* Js., that the making of all the branch roads was not a condition precedent to the main road becoming a public road as soon as it was completed and fit to be travelled on, but that the main road, when so completed and certified to be so by two justices, became a public road, although the branch roads were still unfinished. *The King* v. *The Justices of the West Riding of Yorkshire, H.* 4 *W.* 4. Page 1003

HIRING FOR A YEAR.

See MASTER AND SERVANT, 1, 2.

INCLOSURE ACT.

1. By an act for inclosing common lands in *G.* after reciting that the corporation of *G.* claimed the right of soil as lords of the manor, and that certain individuals were proprietors of the common lands intended to be inclosed, it was enacted that the commissioners might set out and allot plots of ground out of the *East* and *West Commons* in *G.* as a compensation for the rights of common of *all the owners and proprietors of commonable messuages or cottages*, for such messuages or cottages only, as well on the said commons as on certain other lands named, such plots of ground to be used and enjoyed as the commissioners should by their award direct. Parties dissatisfied with the award might bring an action against the persons in whose favour the determination should be, within three months, or might appeal within six months to the justices in quarter sessions who were to determine the matter and award costs and damages. In default of such action or appeal, the determination of the commissioners was to be final.

The commissioners by their award, allotted a plot of land on the *West Common* as common pasture, *to the owners and proprietors of commonable messuages or cottages*, and their respective tenants or occupiers of the said messuages and cottages only having a right of common on the said *West Common;* and they limited the use of the pastures as the act empowered them.

Before the passing of the act, the rights attached to the commonable messuages could only be exercised by such occupiers as were freemen of the borough of *G.* Subsequently to the act one of the messuages on *West Common* being in the hands of a person not a freeman, the corporation brought trespass against him for turning his cattle on the above mentioned allotment:

Held, that the act, though general in its words, did not authorise the commissioners to extend the benefit of their allotments in lieu of common, to occupiers who were not freemen; and that the award itself did not purport to do so; nor could it have done so unless the act had given power to the commissioners to ascertain who should be entitled to the newly granted rights: and consequently, that the present action was maintainable, though brought more than six months after the award. *The Bailiffs of Godmanchester* v. *Phillip's, T.* 3 *W* 4. Page 198

2. By an inclosure act it was declared that all the allotments to be set out to the several persons having

right of common upon a moor should be deemed to be situate within the same townships and places respectively, wherein the lands lay in respect of which such allotments should be made; and it was provided that nothing in the act should affect the right of *W. P.* to certain coal mines under the said moor: Held, that the first clause affected only those portions of the soil which were allotted to the commoners, and not the coal mines under those allotments; and therefore that such coal mines were rateable to the relief of the poor in the parish in which they were actually situate, as they were before the act passed, though the allotments became rateable elsewhere. *The King* v. *Pitt, M.* 4 *W.* 4. Page 565

INDICTMENT.

See New Trial.

1. An indictment found at the *Suffolk* Lent assizes 1833, on a charge of felony preferred in *September* 1832 was removed into *K. B.* by certiorari, and a motion made to award a venire into another county, on a suggestion that a fair trial could not be had in *Suffolk;* in support of which application many affidavits were put in, sworn in the autumn of 1832, shewing that a strong prejudice existed in *Suffolk* against the defendants on the subject of this charge.

   The Court held that there were not sufficient grounds laid for removing an indictment from the body of a large county, and discharged the rule. *The King* v. *Holden and Another, T.* 3 *W.* 4. 347

2. An indictment for a libel on the governor of a parish workhouse was preferred by the direction of the select vestry of the parish; and the defendant having rem it by certiorari into *K. B.*, convicted: Held, that the lib party was not the party gri within the statute 5 & 6 *W M. c.* 11. *s.* 3. and therefore not entitled to costs. *The on the prosecution of Brind Dewhurst, T.* 3 *W.* 4. Pag

3. An act of parliament prob the erection or continuance c building within ten feet o road, and declared that the paths should be subject t act, and be part of the roa further enacted that if any building should be erected o tinued contrary to the a should be deemed a commo sance. By another clause magistrates were empower convict the proprietor and pier of such building, and to an order for the removal the

   Held, that notwithstandin latter clause the party who er or continued a building, con to the act might be indicted nuisance:

   Held also, that an open having its front built on the f ation of an old wall immed adjoining the foot-path, and nected by a roof with the fr a house which was more tha feet from the road, was a bui within the meaning of the *The King* v. *Gregory, M.* 4

INFANCY.

See Bill of Exchange, 1

INHABITATION.

See Settlement by Appren ship, 2.

INJUNCTION.

See Arrest, 2.

INNS OF COURT AND CHANCERY.

See MANDAMUS, 6.

INQUISITION.

See CORONER.

INSOLVENT ACT.

See EJECTMENT, 3. FEME COVERT.

INSURANCE.

1. Valued policy of insurance on ship and goods at and from the the coast of *Africa* to the ship's port of discharge in the United Kingdom, with liberty to touch at all ports and places whatsoever and wheresoever, to trade backwards and forwards in any order, and to call at or proceed to the *Azores*, *Madeira*, *&c.*, and all *African* islands: beginning the adventure on the goods from the loading thereof aboard the said ship, twenty-four hours after her arrival on the coast of *Africa*, including the risk in boats in loading and unloading, with liberty to load, unload, sell, barter, or exchange with any ships or factories wheresoever she might call.

First, The policy does not protect an outward cargo shipped before the vessel's arrival on the coast of *Africa*.

Secondly, A considerable proportion of the intended homeward cargo not being shipped at the time of a total loss, and the part shipped not being equal to the value put on the goods in the policy: Held that the valuation was opened; and that although the part shipped of the homeward cargo, together with a part of the outward cargo then remaining on board, made up the amount named in such valuation, the assurer could recover only a proportion estimated on the part of the homeward cargo shipped at the time of the loss. *Rickman and another* v. *Carstairs*, *M.* 4 *W.* 4. Page 651

2. A ship was insured from *April* 1st, 1831, to *January* 1st, 1832, warranted not to sail foreign after the times limited in certain club rules. The rules or warranties of the club limited the times of sailing to different parts of the world; and by a distinct warranty (the ninth), it was declared that the time of clearing at the custom-house should be deemed the time of sailing, *provided the ship was then ready for sea.* The vessel insured was bound for the bay of *Fundy* from *Dublin*, and the last day for sailing by the rules, was the 1st of *September*. She cleared out on the 31st of August, and dropped down the *Liffey* on the 1st of *September*, with an incomplete crew (though a full complement was engaged before the ship cleared out), to a place within the port of *Dublin*, where she lay at anchor the rest of the day. During that day the whole crew came on board, and on the 2d she proceeded on her voyage, having been prevented doing so on the 1st by an unfavourable wind. She was afterwards lost:

Held per *Littledale* J., and semble per *Taunton* J., that the policy must be construed as incorporating the ninth article of warranty, and not merely the several directions as to the times of sailing. (*Denman* C. J., and *Patteson* J. dubitantibus):

Held by all the Court, that the ship did not actually sail till after the 1st of *September*, and that she was not ready for sea at the time of clearing out, the whole crew

crew not being then on board. —(*Littledale* J. dubitante), that the words in the ninth article of warranty, "provided the ship is then ready for sea," if incorporated with the policy, must be limited to the point of time at which the clearances were obtained, and that as the vessel was not then ready for want of a full crew, there had not been a constructive sailing on or before the 1st of *September*, according to the ninth warranty. By one of the rules it was provided, that vessels might sail after the limited time, on payment of an additional premium, as per scale; and by another rule, every member of the club, before the commencement of each voyage, was to give his acceptance for the premium; and parties neglecting to give notice were subject to a penalty: Held (assuming that these rules could be incorporated with the present policy), that a party whose ship had sailed too late and been lost, could not afterwards obtain the benefit of the extended time, by submitting to the penalty and paying the extra premium. *Graham* v. *Barras*, *H.* 4 *W.* 4. Page 1011

INSURANCE BROKER.

See EVIDENCE, 6.

A trustee suing as a plaintiff in a court of law, must be treated in all respects as a party to the cause, and any defence against him is a defence in that action against the cestuique trust who uses his name. And, therefore, where a broker, in whose name a policy of insurance under seal was effected, brought covenant, and the defendants pleaded payment to the plaintiff, according to the tenor and effect of the policy, and the proof was, that after the loss happened, the assurers paid the amount to the broker, by allowing him credit for premiums due from him to them, it was held, that although that was no payment as between the assured and assurers, it was a good payment as between the plaintiff on the record and the defendants; and, therefore, an answer to the action. *Gibson* v. *Winter and another*, *T.* 3 *W.* 4. Page 96

INTEREST.

See BANKER, 1.

INTERPLEADER ACT.

See PRACTICE, 8.

JUDGMENT.

See PLEADING, 1. PRACTICE, 9.

A judgment entered up on a warrant of attorney, given by a beneficed clergyman in the North Riding of *Yorkshire*, to secure payment of an annuity, need not be registered under 8 *G.* 2. *c.* 6.; for though it may be enforced by sequestration, the benefice is not *affected by the judgment.*

The judgment was for 1800*l.* The warrant of attorney provided, that on the death of the defendant, and full payment of arrears of the annuity, satisfaction should be entered on the record. A second judgment having been signed by a different creditor, who sued out a sequestrari facias thereupon, it appeared that at that time the former creditor had by sequestrations levied more than 1800*l.* for arrears of his annuity, and there

there were arrears still due. The Court ordered that satisfaction should be entered on the roll of the former judgment, as of the date when judgment was signed by the second creditor; and that the sums levied since should be paid over to him. But they refused to order payment to this creditor of the surplus over 1800*l.*, levied before the signing of his judgment. *Cottle* v. *Warrington, Clerk, T.* 3 *W.* 4. Page 447

JUSTICES.

1. An adjudication of justices under 11 *G.* 2. *c.* 19. *s.* 4. (inflicting penalties for fraudulently removing goods to avoid a distress) is an order, and not a conviction, and cannot, therefore, like a conviction, be returned to the sessions in an amended form. *The King* v. *The Justices of Cheshire, T.* 3 *W.* 4. 439
2. A party who applies to the Court for a criminal information against a defendant, for breach of duty as a magistrate as well as an individual, must, before motion, give notice to the defendant of his intended application. *The King* v. *Heming, M.* 4 *W.* 4. 666
3. A party gave information on oath before a magistrate, that from certain language used towards him he was in bodily fear from another; and the magistrate upon hearing the complaint required the latter to enter into recognizances to keep the peace. On motion to discharge the recognizances, on the ground that the language was used in a metaphorical sense only, the Court refused to interfere, because it was for the magistrate to judge in what sense the language was used. *The King* v. *Tregarthen, M.* 4 *W.* 4. 678

JUSTICES, ORDER OF.

An order of justices under the 11 *G.* 2. *c.* 19. *s.* 4. adjudging a party to pay double the value of goods fraudulently and clandestinely removed to prevent a distress, must shew on the face of it that the party removing the goods was tenant; and that is not sufficiently shewn by stating that, on complaint duly made, the party was charged with having fraudulently removed his goods from certain premises to prevent *A. B.* from distraining them for arrears of rent due to him for the said premises; and that it appearing that he did so remove, &c. he is convicted thereof.

Semble, also that the order should state that the complainant was the party's landlord, or the bailiff, servant, or agent of such landlord. *The King* v. *Davis and Another, M.* 4 *W.* 4. Page 551

LANDLORD AND TENANT.

See EJECTMENT, 4. EMBLEMENTS. JUSTICES, ORDER OF. LEASE, 3.

LEASE.

1. Under a lease of all that part of the park called *B.*, situate and being in the county of *O.* and now in the occupation of *S.*, lying within certain specified abuttals, with all houses, &c. belonging thereto, and which now are in the occupation of *S.*, a house on a part which is within the abuttals, but not in the occupation of *S.* will pass. *Doe dem. Smith and Others* v. *Galloway, T.* 3 *W.* 4. 43
2. Lands were devised to *R. N.* for life, with power to lease for lives all but a certain excepted portion, reserving the like rents as were then reserved, or more. The rent of the lands to be demised was then

then 29*l.* a year. In 1800 *R. N.* made a lease of the last-mentioned lands to *G. M.* for three lives, at the yearly rent of 35*l.* In 1813 he made another lease to *G. M.* of the same premises and part of the excepted lands, for different lives, at the rent of 40*l.* for the whole: Held, that the rent could not be apportioned, and that the last lease, being void for the excepted lands, was void as to all. *Doe dem. Williams and Others* v. *Matthews*, *T.* 3 *W.* 4. Page 298

3. Premises were demised for a term at a certain rent, with a proviso for re-entry if the rent should be in arrear twenty-one days: the lessee covenanted to pay the rent, and the landlord covenanted that he, *paying the rent* at the appointed times should quietly enjoy, &c.:

Held, that the lessee having been disturbed in his possession, might bring covenant against the landlord, though at the time when the cause of action accrued, the rent had been in arrear more than twenty-one days; for that the payment of rent was not a condition precedent to the performance of the covenant for quiet enjoyment. *Dawson* v. *Dyer*, *Bart. M.* 4 *W.* 4. 584

4. Where *A.* demises to *B.* for the term of *his* natural life, the demise is, primâ facie, for the life of *B.* But where *A.* demised to *B. his executors and administrators*, for the term of *his* natural life, and the lease contained a covenant by *A.* for quiet enjoyment of the premises by *B.*, his executors. &c. during the natural life of *A.*:

Held, that the word "*his*" in the demising clause must be referred to *A.* the grantor, and not to *B.*, though his name was the last antecedent. *Doe on the demises of Pritchard and Others against Dodd*, *M.* 4 *W.* 4. 689

5. A power was reserved to grant leases for a term not ex seven years, so as there served in such leases the b that could be gotten for th without taking any prem the making thereof. Th of the power granted a l seven years, at a specifi which lease contained a c by the lessee, to find boar ing, and wearing appare the term, for three childre donee (if they wished it), year each, and for the don gratis: Held, by *Parke* a *teson* Js. (*Taunton* J. disse that assuming the power to two conditions, first, that reserved should be the be and, secondly, that there be no fine or premium: it clearly appear on the face lease that either of tho ditions had been broken, the covenant to maintain th ren was not necessarily be to the lessor, and, therefor evidence was admissible t that the rent reserved w best that could be obtained *dem. Rogers* v. *Rogers*, *M.* 4 Pa

6. A lease for three lives co a proviso, that if the less heirs, &c. should, during th tinuance of the term, hap become insolvent, and un circumstances to go on w management of the farm, mise should from thencefort and be absolutely void. (being the second cestuiq under such lease, was at of felony, and transporte mother and sister occupi farm from that time, till piration of the third life na the lease, and during that the reserved rent was re paid to *R. W. P.*, to wh reversion had come by dev who knew all the facts. T

of his becoming entitled did not appear. The reversioner, on the expiration of the third life, supposing that the term was at an end in point of law, let the land to a new tenant, whom he afterwards ejected, the attainted party being still alive.

Quære, whether the attainder of the tenant was a forfeiture of the lease; but, held, that if it was a breach of the condition, it was not a continuing breach, but was contemporaneous with the conviction:

Quære also, if a forfeiture was committed, whether it was one of which an assignee of the reversion might take advantage by stat. 32 *H.* 8. *c.* 34.

Held, that if such a forfeiture was committed, the reversioner had waived it by accepting the reserved rent under the lease, from the parties occupying the premises:

Semble, that if the forfeiture had not been waived, a sufficient entry had been made to avoid the lease. *Doe dem. Griffith* v. *Pritchard, M.* 4 W. 4. Page 765

7. An instrument in writing, whereby *A.* agreed to let premises to *B.* for seven, fourteen, or twenty-one years (commencing at *Christmas Day* then next), at the option of *B.* at the yearly rent of 24*l.* payable quarterly, the first payment to be made at the ensuing *Lady Day* free of all rates and taxes, and whereby *B.* stipulated if he should be desirous of putting an end to the agreement at either of the terms before specified, to give six months' notice, and that he, *B.*, should pay all the expences of preparing a lease for either of the terms above stated, is a lease, and not a mere agreement for a lease. *Warman* v. *Faithful, H.* 4 *W.* 4. 1042

LEASEHOLD.

See VENDOR AND VENDEE.

LEET.

See CUSTOM, 2.

LEGACY DUTY.

See DEVISE, 2.

LICENCE.

See ACTION ON THE CASE, 1.

LIEN.

See STOPPAGE IN TRANSITU, 1, 2.

A. wishing to borrow money on a mortgage of land, delivered the title-deeds to *B.*, the intended mortgagee, for examination, and said that he would pay all expences. *B.* handed the deeds to his own attornies to be investigated. The negotiation went off, and the attornies being requested by *A.* to return his deeds, refused to do so till he paid their bill of costs. On assumpsit brought by *A.* against the attornies, to recover back the money so paid:

Held that the defendants could not be considered as having acted for both parties in the negotiation, and therefore had not a lien against *A.* as his attornies: that, supposing *A.* liable to *B.* for the costs incurred, *B.* could not communicate to his own attornies a lien upon *A.*'s deeds, by handing them to the attornies for investigation: that the undertaking of *A.* to *B.*, if it amounted to a promise to pay these costs, did not entitle *B.*'s attornies to detain the deeds, as it established no privity between them and *A.*: And that *A.* might have brought trover for the deeds, and was entitled to recover

lations of the society of *Clifford's Inn*, to enable the benchers to decide on the validity of his election to that office. But on cause shown, the rule was discharged, no sufficient proof appearing, that the benchers of the *Inner Temple* had a compulsory authority over *Clifford's Inn* for this purpose. *The King* v. *Allen, Gent., H.* 4 *W.* 4. Page 984

7. A resolution of a court of quarter sessions, that whenever an appeal against an order of removal shall be entered and *respited*, notice thereof shall, within one month after such entry and respite, be given to the officers of the removing parish, is void; and where the court of quarter sessions had dismissed an appeal for want of such notice, this Court granted a mandamus to them to hear it. *The King* v. *The Justices of Norfolk, H.* 4 *W.* 4. 990

8. Under stat. 1 *W.* 4. *c.* 21. *s.* 6., the costs of a mandamus, and of applying for it, may be obtained of the Court by a distinct motion after issuing of the writ.

And upon such motion for costs, the Court will refer for its guidance to the affidavits filed in support of the application for a mandamus, if it be clear that both applications are made by the same parties. *The King* v. *Kirke, H.* 4 *W.* 4. 1089

9. A party found guilty by a jury at a session irregularly holden is entitled to have the record of the proceedings correctly made up according to the fact, and this Court will grant a mandamus to the justices to make up such record. *Rex* v. *the Justices of Middlesex, in re Bowman* 1113

MARRIAGE SETTLEMENT.

A father, seised in fee, executed a deed of settlement on the marriage of his son, containing the following clause: — "*Whereas* it is agr upon by and between the par to these presents, that the *A. J.* (the father) *gireth settleth* upon his said son *Griffi* all and singular the premises, *from Michaelmas next* for the t of his natural life; and from immediately after his decease the use of the first son of the b of the said *Griffith J.* on the b of *J. J.* (his intended wife) t lawfully begotten, and so on cessively for all and every ot son," &c.; and in default of s issue male, the like limitation the daughters; and for want such issue, to the use of the tlor's right heirs: Held, that clause was not a mere execut agreement, but operated, in l as a covenant by the settlor stand seised to the uses decla by the settlement. Namely, the uses of the first and other s of *Griffith J.* successively for th respective lives. *Doe dem. Jo* v. *Williams, M.* 4 *W.* 4. Page 7

MASTER AND SERVANT.

1. In an action for wages by a s vant, who was dismissed, the pr was, that he was to have wages *the rate of* 80*l.* per annum: H that the primâ facie presumpt was, that the hiring was for a ye and that having been rightfu dismissed for misconduct bef the year expired, he could not cover wages pro ratâ. And th although the master had broug an action against him for the m conduct, and recovered damag *Turner* v. *Robinson, M.* 4 *W.* 7

2. On the 5th of *March* 1832, entered as warehouseman into t service of *B.*, the latter engagi to pay *A.* at the rate of 12*l.* l per month for the first year, a to advance 10*l.* per annum un t

the salary was 180*l.*: Held that this was a contract by *B.* to employ *A.* for one whole year. *Fawcett* v. *Cash, H.* 4 *W.* 4. Page 904

MILITIA MAN.

See SETTLEMENT BY HIRING AND SERVICE, 3.

MONEY HAD AND RECEIVED.

See ASSUMPSIT, 1.

MORTGAGE.

See DEED. EJECTMENT, 4.

MORTGAGOR AND MORTGAGEE.

See LIEN.

MOTION TO SET ASIDE AWARD.

See ARBITRAMENT, 2, 3.

NEGLIGENCE.

See BILL OF EXCHANGE, 2, 3.

NEW TRIAL.

See PRACTICE, 5. 10.

On indictment for non-repair of a highway which defendant was stated to be liable to repair ratione tenuræ, and verdict found for the defendant, a new trial was moved for, on the ground of misdirection, and the improper rejection of evidence. The Court refused a new trial, but suspended the judgment in order that a new indictment might be preferred.

Quære, whether a new trial is grantable after acquittal in any criminal case, except a penal action. *The King* v. *Sutton, T.* 3 *W.* 4. Page 52

NON EST FACTUM, PLEA OF.

See CORPORATION.

NOTICE OF APPEAL.

See MANDAMUS, 4. 7.

NUISANCE.

See INDICTMENT, 3.

OCCUPIER.

See POOR RATE. SETTLEMENT BY RENTING A TENEMENT, 3.

ORDER OF JUSTICES.

See JUSTICES, ORDER OF.

ORDER OF REMOVAL.

See SETTLEMENT BY ESTATE.

Two justices ordered *F. C.* the wife of *R. C.* a Scotchman, having no settlement in *England*, and a lunatic, to be removed from parish *A.* where she had become chargeable to parish *B.*, which was adjudged to be her lawful settlement. The order did not state where the husband was when it was made: Held, that the order was not void on the ground that it would effect the separation of husband and wife; because it was not to be presumed that when it was made, the husband was residing in parish *A.*, or was not residing in parish *B.* *The King* v. *The Inhabitants of Stockton, M.* 4 *W.* 4. 546

ORGANIST.

ORGANIST.

See SETTLEMENT BY SERVING AN OFFICE.

PARTNERSHIP.

1. *A.* and *B.* dissolved partnership, and agreed that the business should be carried on by *B.* alone; and that he should receive and pay all debts. Sufficient partnership funds were left in his possession. *C.*, a creditor of the firm, afterwards applied for payment of his debt to *B.*, who informed him that *A.* knew nothing of his debt, and that he, *C.*, must look to *B.* alone. *C.* then drew a bill on *B.*, which he accepted, but which was afterwards dishonoured: Held, in an action brought by *C.* against *A.* and *B.* (the latter having become bankrupt), that it was a question for the jury whether it had been agreed between *C.*, the creditor, and *B.*, that the former should accept *B.* as his sole debtor, and take his acceptance in satisfaction of the debt due from both: Held further, that such an agreement and receipt of the bill would be a good answer to a suit by way of accord and satisfaction; and that the fact of *B.* having had the partnership effects left in his hands, and having agreed with *A.* to pay all the partnership debts, was evidence of an authority from *A.* to make such agreement on his behalf.

After a rule for a new trial had been granted on the above grounds, *A.* also became bankrupt, but *C.* did did not prove his debt under the commission. *A.*'s attorney having carried down the record by proviso, *C.* applied for a stet processus, alleging that he could derive no benefit from proceeding. The Court refused to interfere.

Thompson v. *Percival*, *Hilary T.* 4 *W.* 4. Page 925

2. One of several partners in trade who pays money on account of his co-partners, cannot maintain an action against them for contribution, on the ground that he made such payment not voluntarily, but by compulsion of law. *Sadler* v. *Nixon*, 4 *W.* 4. 936

PART OWNER.

See BANKER, 2.

PAYMENT.

See INSURANCE BROKER.

PAYMENT OF MONEY INTO COURT.

See PRACTICE, 4. 12.

PENAL STATUTE.

See DISTRESS.

PENALTY.

See VENDOR AND VENDEE, 1.

PLEADING.

See BILL OF EXCHANGE. 1. BOND, 3. CORPORATION. COVENANT.

1. In declaring on a judgment signed in vacation, on certificate by the judge at Nisi Prius for immediate execution (under 1 *W.* 4. *c.* 7. *s.* 2.) the day of signing judgment should be stated according to the fact, and not laid as of the preceding term.

But it is enough to set out the judgment as it appears on the record; the certificate need not be stated.

The postea, however, in such a case,

case, should be so framed that the judgment may appear to be warranted by the previous finding of a jury.

But when on nul tiel record pleaded to debt on recognizance of bail, the postea shown to the Court proved erroneous in this respect, leave was given to amend it; the defendants also having leave to plead de novo.

Semble, that the Court would have allowed the error in the declaration to be amended without permitting the defendants to plead again. *Engleheart* v. *Eyre and Another*, *T.* 3 *W.* 4. Page 68

2. Declaration of Easter Term, 1831, on a replevin bond, by the assignees of the sheriff against *W.*, the plaintiff in replevin and his sureties, after stating the condition, assigned as a breach, "that although the suit was removed into K. B. by re. fa. lo. returnable in Michaelmas Term, 1829, at the instance of *W.*, the plaintiff in replevin, yet he did not prosecute his suit *with effect and without delay.*

Plea, first, that by the re. fa. lo. the sheriff was commanded to record the plaint, to have the record on the return day in K. B., and to prefix the same day to the parties, that they might be ready to proceed in the said plaint; that *W.*, the plaintiff in replevin, appeared in court at the return, and was ready to proceed in the suit, and prosecute the same with effect and without delay, but that the now plaintiffs did not appear, and the sheriff returned to the re. fa. lo., amongst other things, that he had prefixed the same day to the parties that they might be ready there to proceed in the said plaint. It then averred that *W.* was always ready to prosecute his plaint with effect, and without delay, and would have done so if the defendants in replevin (the now plaintiffs) had appeared. To this plea there was a general demurrer.

The second plea stated that the sheriff, in pursuance of the re. fa. lo., recorded the plaint, returned it, prefixed the day of the return to both parties, *and summoned the now plaintiffs to appear* in *K. B.* to proceed in the plaint; and that *W.*, the plaintiff in replevin, was ready to proceed, but the now plaintiffs did not appear. Replication, that the sheriff did not summon the now plaintiffs to appear. Rejoinder, by way of estoppel, that the sheriff, before the assignment, returned to the re. fa. lo. that he had prefixed a day to the parties that they might be ready to proceed in the plaint. General demurrer.

Held first, that a plaintiff in replevin, who does not use due diligence in prosecuting the suit, is guilty of a breach of that part of the condition of the bond which requires him to prosecute without delay, even though it may not appear that the suit is determined.

Secondly, admitting that upon the replication to the second plea it was to be assumed that the now plaintiffs were not summoned, (and semble, that in the present action they were not estopped from alleging this,) still as it appeared by the pleas that the re. fa. lo. contained a direction in effect to summon the now plaintiffs, *W.*, the plaintiff in replevin, was not responsible for the default of the sheriff, or guilty of delay in that suit by reason of the sheriff having neglected to serve a summons. *Harrison and Another assignees* v. *Wardle and Others*, *T.* 3 *W.* 4. Page 147

3. Trespass for breaking and entering two closes of the plaintiff. Plea, that *the said closes in which*, &c. were from time immemorial parcels of a waste, and that the defendant had a prescriptive right

of common in the waste, and entered at the times, when, &c. to use his right of common thereon; and, because the closes in which, &c. were wrongfully separated from the residue of the waste, he broke down the gates. Replication, that *the said closes in which*, &c., at the said times, were not wrongfully separated from the residue of the waste, but continually for twenty years and more, and before the first time, when, &c., had been and were separated, and divided, and inclosed from the residue of the waste, and occupied and enjoyed during that time in severalty. Rejoinder traversed this averment, and issue was joined thereon:

Held, that the allegation in the replication "that the said closes in which, &c. for twenty years and more, had been inclosed from the residue of the waste, and enjoyed in severalty," was divisible, and satisfied by proof, that *any part* of the closes in which the trespasses were committed had been so inclosed for that period. *Tapley* v. *Wainwright*, *T.* 3 *W.* 4. Page 395

4. Declaration stated, that an iron-foundery, messuages, and cranes, boilers, and other machinery, &c., which were described, were in the possession of plaintiff's tenant, the reversion belonging to plaintiff; and that defendant, contriving to injure plaintiff in his reversionary interest, while he was such reversioner, broke and entered *the said founderies, machinery, &c. and messuages, with the appurtenances, cranes, boilers*, &c. tore up, broke down, and prostrated *the same*; seized, carried away, and converted the machinery, &c., and the cranes, boilers, &c., affixed to plaintiff's reversionary interest, and scattered and spread *the same* with rubbish, and greatly injured the said reversionary estate. Plea, not guilty. At the trial it appeared th plaintiff had no right to th tures: Held, nevertheless enough appeared on this ation to support a verdict f plaintiff for unnecessary d done in removing the fixtu which proof had been given. v. *Horton*, *W.* 4 *W.* 4. Pa

5. Vendor covenanted under vendee that he would, on or the 30th of *November* then deduce a good title to the pr sold; and would, on or befo 8th of *January*, execute a conveyance for conveying simple; and it was stipulate the conveyance should be pr by and at the expence vendee; and further, that vendor should not verify th to the vendee or his agent, duction of deeds, &c., at *N Lynn*, or *London*, before th of *November*, the agreement be void.

In an action of covenant vendee, two breaches we signed: first, that the vend not, on or before the 30th *vember*, deduce a good titl condly, that the defendant d on or before the 8th of *Ja* execute a proper conveyanc

Plea, first, that the vend before the 30th of *Novembe* duce and shew divers dee *part* deducing a good titl that until and upon that d was ready and willing to p and show to the vendee deeds, completing such titl would, on or before that day produced such deeds to the v or his agent attending, w the vendee had notice, but t would not by himself or attend: Held, on special dem that the plea was bad, ina as the vendor's covenant w neral, and therefore the facts were no excuse; and, that if t

venant could be read as qualified by the subsequent stipulation as to place, the plea ought to have averred notice to the vendee, at which *of the three places*, the vendor would be ready to produce his deeds.

Plea, secondly, to the first breach, that by a subsequent agreement made before any breach committed, the time for deducing title had been enlarged; and that the vendor was ready to deduce title within such enlarged time. Thirdly, the defendant, pleaded a similar agreement after breach, and that the plaintiff accepted such agreement as a substitution for the former, and as a satisfaction of the damages resulting from the breach; and that defendant was ready to fulfil such agreement, but plaintiff refused, &c.:

Held, on special demurrer, that the second plea was bad, in not stating the new agreement to have been under seal. Leave given to amend the third plea by stating the new agreement to have been in writing; but quære, if it were so, whether the facts amounted to a good accord and satisfaction.

Plea to the second breach of covenant, that the vendor until and on the 8th of *January*, was ready and willing to execute proper conveyances, and would have executed the same, if the plaintiff would have prepared and tendered them, but that he did not do so.

Replication, that the vendor did not deduce a good title, wherefore the vendee did not prepare the conveyances.

Rejoinder, that although the vendor within a reasonable time before the 8th of *January*, was ready and willing, and offered to deduce a good title, so that the vendee might before the 8th of *January* have prepared and tendered conveyances whereof the vendee had notice, yet the vendee refused to have such title deduced, and discharged the defendant from deducing such title.

Surrejoinder, that the vendor was not ready and willing to deduce, &c.

On general demurrer, Held, that upon this breach, the matter pleaded by the vendee was no answer to the pleas of the vendor, and that the latter was entitled to judgment. *Rippingall* v. *Lloyd*, *M.* 4 *W.* 4. Page 742

6. *A.* being arrested and in custody of the sheriff at the suit of *B.*, upon a writ indorsed "oath for 76*l.*;" *C.*, in consideration of *B.* discharging *A.*, undertook to give his promissory note at six months, "for 10*s.* in the pound for *the* debt," on the arrival of the discharge:

Held, that this sufficiently appeared to be a promise to pay 10*s.* in the pound upon the debt for which *A.* was arrested and then in custody, and was properly declared on as such:

Held also, that the sum indorsed on the writ was sufficient evidence of the amount for which *A.* had been arrested. And that no demand of the note was necessary to enable plaintiff to commence this action. *Brown* v. *Dean*, *M.* 4 *W.* 4. 848

7. By a contract in writing between plaintiffs (three executors) and defendant (testator's heir at law), after reciting an agreement of all the parties, that certain goods of the testator should be sold, and that *S.*, one of the executors and plaintiffs, should receive the proceeds for and towards payment of the testator's debts; defendant agreed, that if he took possession of the said goods, he should *pay to S.* the value thereof, or give security for such payment, on or before, &c. One of the plaintiffs

and the defendant also undertook, if the proceeds of the testator's personal property should not be sufficient for payment of the debts, to raise and pay to *S.* a sufficient sum to enable him to discharge them. Defendant took the goods first mentioned, but did not pay for them or give security, and afterwards, finding that they were more than he wanted, he made a verbal agreement with the plaintiffs, that he should select so much of the goods as he wished for, *and take the same at the prices they had been appraised at,* and that the residue should be taken and sold by the plaintiffs. He accordingly selected and took such goods, (being of a smaller value than those first bargained for,) but did not pay for them. Plaintiffs as executors took the residue:

Held, that supposing the action to be grounded on the written contract, *S.* was named therein merely as the agent of the plaintiffs, and therefore that they need not declare specially upon the contract to pay the money to him.

Semble, per *Denman* C. J. and *Parke* J., that the second contract might be considered as substituted for the first, and forming a new and distinct ground of action. *Pearson* v. *Pearson*, *M.* 4 *W.* 4. Page 859

8. After the passing of the act for the uniformity of process, 2 *W.* 4. *c.* 39. which directs, "that all personal actions, where it is not intended to hold the defendant to bail, &c. shall be commenced by writ of summons;" an executrix pleaded, to an action of assumpsit, plene administravit, and no assets on the day of exhibiting the bill of the plaintiff. The plaintiff in his replication tendered issue in the words of the plea:

Held, that the words exhibiting the bill upon these pleadings meant the commencement of t by writ of summons and filing of the declaration; a fore that evidence of p made by the executrix the time of suing out the the filing of the declarat inadmissible. *Rees* v. *Mo* 4 *W.* 4. Pa

POOR CHILD.

See SETTLEMENT BY APPR SHIP.

POOR RATE.

See INCLOSURE ACT,

By a grant of *G.* 1. reciting *Chelsea Water Works'* (had undertaken works fo ing *Westminster*, &c. wit and had petitioned the c liberty to use a certain basin and old pond in *St.* park, and to lay mains thr park to and from the sam purpose aforesaid; and surveyor general had that the said undertaking convenient to his majest many of his subjects, a mental to the park; the K granted and assigned to pany and their successors canal, &c. to be conver reservoirs and to be used joyed by them as such, purposes aforesaid, during pleasure. Liberty was als them to break up the g all times through the said laying therein pipes or and from the old pond a for the purposes aforesaid good the ground so broke as possible. Certain c were added, prescribing t tion in which the pipes carried, the breadth of g

be broken, &c. The company were to supply *St. James's* palace at reasonable rates; and the ranger was empowered to supervise all the company's works in the park and order them to rectify and reform the same if not done according to the conditions.

The company took the basin and pond in pursuance of the warrant, and made a reservoir, into which they conveyed water, and laid pipes communicating with it for the purposes aforesaid. They subsequently made expensive improvements in and about the reservoir, on the requisition of the crown; and they were never allowed to alter or repair it but by leave, and under the inspection of the crown surveyor. They pay no rent and are paid for supplying the palace, as well as other residences. The ranger is rated to the poor for the herbage growing on the surface of the soil in the park, including that under which the pipes pass:

Held, first, that the company were rateable as occupiers of the reservoir; secondly, that they were rateable for the occupation of land below the surface of the soil by their pipes, though another person was rated for the herbage. *The King* v. *The Governor and Company of the Chelsea Water Works, T.* 3 *W.* 4. Page 156

POSTEA.

See PLEADING, 1.

POWER.

See LEASE, 2, 5.

POWER OF ATTORNEY.

See COPYHOLD, 5.

PRACTICE.

See INDICTMENT, 1. NEW TRIAL.

1. Sections 87, 88, of the first General Rule of *Hilary* term 2 *W.* 4. relating to the discharge of prisoners in the custody of the marshal of the *King's Bench* and warden of the *Fleet*, who are supersedeable, apply only to persons within the walls of the respective prisons. *Siggers* v. *Brett, Clerk, T.* 3 *W.* 4. Page 455
2. The Uniformity of Process Act, 2 *W.* 4. *c.* 39. Sched. No. 4. repeals sect. 24. of the first General Rule of *Hilary* term 2 *W.* 4.; and, therefore, if a party held to bail on a capias do not put in special bail within eight days after execution of the process upon him, including the day of such execution, the plaintiff, immediately on the expiration of that time, may put the bail bond in suit. *Hilary* v. *Rowles and Two Others, T.* 3 *W.* 4. 460
3. The 7 & 8 *G.* 4. *c.* 30, *s.* 41., which directs that actions brought for any thing done in pursuance of that statute, shall be tried in the county where the fact was committed, applies only to the case of parties exercising particular powers conferred by the statute.

   In an action against justices for falsely imprisoning the plaintiff on a charge of feloniously beginning to demolish a house, contrary to the act, the Court granted a rule to change the venue, on a suggestion that a fair trial could not be had in the county. *Thomas, Gent.* v. *Saunders and Another, T.* 3 *W.* 4. 462
4. Payment of money into court on a count on a promissory note payable by instalments, is only an admission by the defendant that money to the amount paid in was due on the promissory note; it

does not bar the Statute of Limitations as to a further sum claimed to be due on the same note. *Reid and Another, Executors* v. *Dickens, M.* 4 *W.* 4. Page 499

5. Where a new trial is granted on payment of costs, in a town cause, the costs occasioned by the cause being made a remanet are included. *Robinson* v. *Day, M.* 4 *W.* 4. 814

6. After the Uniformity of Process Act, 2 *W.* 4. *c.* 39., the Court directed the signer of *K. B.* writs to sign a pluries bill of *Middlesex*, in a suit commenced before the act, and which, if recommenced, would have been barred by the Statute of Limitations. *Finnie* v. *Montague, M.* 4 *W.* 4. 877

7. Defendant in an action for words, after notice of trial, signed a paper, in which, after reciting that plaintiff had consented on defendant's paying the costs and making an apology, to stay proceedings, he made such apology: Held, that this was a positive undertaking by defendant to pay the costs.

Plaintiff in such a case having stayed proceedings, but defendant not paying the costs, the Court will enforce performance of the agreement on his part by rule. *Tardrew* v. *Brook, M.* 4 *W.* 4. 880

8. On application to the Court by a sheriff under sect. 6. of the Interpleader Act, a third party served with the rule, and not appearing, is barred by sect. 3. from further prosecuting any claim brought in question by the rule, as well as where such application is made by a defendant under sect. 1.

The Court, on such application, will, on proper grounds shewn, order the sheriff, or the execution creditor, to pay to a third party appearing and successfully prosecuting his claim, his costs of such appearance. *Ford* v. *Dilley, M.* 4 *W.* 4. 885

9. Issue was entered in a cause in *Easter* term, 1827, and docketed according to the practice of the office of judgments. The plaintiff in 1828 recovered damages and costs, and entered final judgment on the roll, but the judgment, according to a practice said to have prevailed for 100 years, was not docketed as required by 4 & 5 *W.* and *M. c.* 20 *s.* 2. On application to the Court in *Hilary* term 1834, to order the judgment to be docketed nunc pro tunc: Held, that the Court had no power to make such order. *Hopwood* v. *Watts, H.* 4 *W.* 4. Page 1056

10. In a cause decided by the judge of an inferior court on a writ of trial, this Court will hear a motion for a new trial on the ground that the verdict was against evidence, though the damages were below 20*l.* *Taylor* v. *Helps, H.* 4 *W.* 4. 1069

11. A motion calling upon an attorney to answer matters alleged against him on affidavit affecting his character, must be made by a barrister. *Pitt Ex parte, H.* 4 *W.* 4. 1078

12. The rule of court *Hil. T.* 2 & 3 *G.* 4. requiring that on all bailable mesne process, the defendant's place of abode and addition shall be indorsed, is in effect repealed by stat. 2 *W.* 4. *c.* 39. and therefore the want of such indorsement is no objection to a capias issued under that statute, and in the body of which the defendant is described as "G. P. of the city of London."

An affidavit to hold to bail for a debt stated therein to be due to *A.* and *B.* is good, though the plaintiffs are partners, and are not stated to be so in the affidavit. *Bodfield* v. *Padmore, H.* 4 *W.* 4. 1095

13. Defendant in a cause, being advised to pay 48*l.* into court, gave his attorney 50*l.* for the purpose of making such payment, which was done. The attorney afterwards

wards delivered his bill to the client, not including the 48*l.*, and on taxation more than one-sixth was taken off. The attorney then claimed to add the 48*l.* (which would have made the deduction less than one sixth), stating that the item had been inadvertently omitted.

Quære, whether such item was chargeable as a disbursement by the attorney, but

Held, that, at all events, the attorney, not having treated it as a disbursement in making out his bill, could not claim to insert it as such, for the purposes of the taxation. *Hayes* v. *Trotter H.* 4 *W.* 4. Page 1106

PREMIUM.

See LEASE, 5.

PRINCIPAL AND AGENT.

See BANKER, 2.

PRISONER.

See ARREST, 2.

PRIVILEGED COMMUNICATION.

See EVIDENCE, 3.

PROHIBITION.

1. The act 1 *W.* 4, *c.* 21. "to improve the proceedings in prohibition," does not enable this Court, where a party has declared in prohibition and succeeded, to grant him his costs incurred in the Ecclesiastical Court. *Tessimond* v. *Yardley, T.* 3 *W.* 4. 458
2. A prohibition cannot issue to a court martial, after its sentence has been ratified by the King and carried into execution. In the matter of *John Waller Poe, M.* 4 *W.* 4. Page 681

PROMISSORY NOTE.

See PLEADING, 6. PRACTICE, 4. STAMP, 2.

PROMOTION, 468

QUO WARRANTO.

A quo warranto information was moved for against an officer elected by ballot, on the ground that a large proportion of the persons who voted were not qualified; but it was not shown for whom the votes of those persons were given:

Held, that on this application the officer could not be required to prove his election valid, but it lay on the opposing parties to show (if that were practicable) that his majority was obtained by bad votes. The *King* v. *Jefferson, M.* 4 *W.* 4. 855

RATE.

See INCLOSURE ACT, 2.

RECOGNIZANCE.

See JUSTICES, 3.

REGULÆ GENERALES. I. 467, 468. 816. i—xxii

REMAINDER.

See DEVISE, 4.

REMANET.

See PRACTICE, 5.

RENT

RENT APPORTIONMENT OF

See LEASE, 2.

REPLEVIN BOND.

See PLEADING, 2.

ROAD.

See HIGHWAY, 1, 2. TOLL.

SESSIONS.

See MANDAMUS, 3, 4, 7, 9.

Where it has been referred to the chairman at sessions, on an appeal, to state a case, and a case has afterwards, on certiorari, been returned to this Court by the clerk of the peace, purporting to be signed by the chairman, this Court will not send it back to be restated, or quash the certiorari, on the ground of the chairman having said that he did not recollect signing the case, and upon a suggestion by the attorney for one of the litigating parties, in an affidavit, that such case does not agree with the facts proved, and that deponent believes the chairman did not settle the case. *Rex.* v. *The Inhabitants of Matlock, M.* 4 *W.* 4.
Page 883

SET OFF.

See ATTORNEY, 1.

SETTLEMENT — *by Apprenticeship.*

See STAMP, 3, 4.

1. A person of the age of twenty-one years, is not a *poor child* whom the parish officers are to bind out apprentice with the assent of two justices within the meanin 56 *G.* 3. *c.* 139. Section that statute extends only t tures of apprenticeship *children;* and, therefore, a ture whereby a person of of twenty-four is bound app part of the premium being of the public parochial fun not require the assent of tices. *The King* v. *The ants of St. John Bedwar* 3 *W.* 4. P

2. Pauper was bound appren seven years to a breeches and served his master half the latter then failed in b and told the pauper he n and work for one *B.*, who another parish, and if pa not become troublesome the first master, or to his till the end of his time, h give pauper his watch. The agreed with *B.*, and wor him at breeches-making, piece, at the usual rate. quently carried messuag tween the first master a pauper. The latter having for *B.* a year in *B.*'s parish, (with the consent of his fi ter) to work by the piece another breeches-maker, l a third parish, who gave terms. While he so work *C.*, his first master came him, and again promised watch at the end of his tim pauper worked two years living in *C*'s parish; h wards left, and his first then sent him his watc pauper kept his earning maintained himself:

Held by *Denman* C. J. *dale*, J., and *Patteson* J. (dissentiente), that the inha of the pauper in the par the second and third ma connected with the appren and that he thereby gaine

ments in those parishes. *The King* v. *The Inhabitants of Banbury*, *T.* 3 *W.* 4. Page 176

3. On special case, the sessions found that *J. E.* by indenture in 1774, was put apprentice to *P.* for and in respect of *W.*'s estate; and there was a covenant by *P.* to teach *J. E.* the business of husbandry. The indenture was executed by the parish officers and *W. P.* was a farmer, and tenant to *W.*, who was a stocking-weaver. *J. E.* never served *P.*, but lived with *W.* long enough to gain a settlement by apprenticeship, if he could acquire one by such service. The sessions not having found that *P.* ever executed the indenture, or assigned the apprentice to, or assented to his service with *W.*, it was held that a settlement by apprenticeship was not proved. *The King* v. *The Inhabitants of St. Cuthbert Wells*, 4 *W.* 4. 939

SETTLEMENT — *by Birth.*

Appellants against an order of removal, to establish a birth settlement proved, first, the marriage of the father and mother at *K.*, in *April* 1749; and, secondly, the baptism at *K.* of their four children, viz. a daughter *M.*, in *May* 1751; a son *J.*, in *May* 1753; a daughter *E.*, in *January* 1755; and another daughter *S.*, in *December* 1756:

Held that the sessions were not bound to infer from this evidence that *E.* was born at *K.* *The King* v. *The Inhabitants of Lubbenham*, *H.* 4 *W.* 4. 968

SETTLEMENT — *by Estate.*

An order of sessions, quashing an order of removal generally, is conclusive evidence between the parties to the appeal, that when the order of removal was made, the appellant parish was not bound to receive the pauper, but it is only primâ facie evidence that the pauper was not settled in that parish; and, therefore, upon the trial of an appeal between the same parishes against a second of removal of the same party, the removing parish may show by parol order evidence that the first order of removal was quashed on the ground that the pauper resided on a tenement of his own, which made him irremovable, though it did not confer a settlement, and that he afterwards sold the tenement, and thereby became removable. *The King* v. *The Inhabitants of Wick St. Lawrence*, *M.* 4 *W.* 4. Page 526

SETTLEMENT — *by Hiring and Service.*

1. Pauper was hired for a year as a footman and groom, by a West India planter residing at *M.* in *England* at 7*l.* wages. He went into the master's service in *February*, 1828, and in *May* following *engaged to bind himself* to serve the same master at *Berbice* as clerk and overseer, for three years from the first day of his arrival there, at a certain salary. Soon after their arrival at *Berbice*, the pauper entered on the office of overseer and clerk, but he also continued to act as servant, and lived in his master's house, and did so until the following *February*, when they returned to *England*, the pauper acting in the capacity of servant on the homeward voyage, and after his arrival in *England*. No further contract had ever been entered into for the pauper's service as overseer. The master paid him his footman's wages till the time of their going abroad,

abroad, and on their return home paid him 20*l.* as salary for the service in *Berbice*, after which he gave him weekly wages under a new agreement:

Held, that there was no dissolution of the first contract, and that the pauper having served forty days under the first hiring, gained a settlement in *M. The King* v. *The Inhabitants of Buckingham, H.* 4 *W.* 4. Page 953

2. A female of full age, who lived with her father and was the main support of his family, hired herself with his consent, and at his desire, to a farmer in an adjoining parish to work at weekly wages during his harvest; she worked for him under this hiring for three weeks, when she received her wages and returned home. In the following autumn she again hired herself to the same farmer, and served him for a fortnight and two days; and on her return home she gave her wages to her father, who expended them for the use of his family. On both these occasions she intended, and was expected by her father, to return home as soon as the harvest work was done. The court of quarter sessions having upon these facts found that the pauper was emancipated, held by *Denman* C. J., *Taunton and Patterson* Js. (*Littledale* J. dissentiente), that their decision was right. *The King* v. *The Inhabitants of Oulton, H.* 4 *W.* 4. 958

3. Pauper on the 16th of *May*, 1811, being in the local militia, hired himself to the colonel of his regiment to serve for a year, and served under that contract. On the 4th of *May*, 1812, the regiment was assembled for training, and continued in training till the 19th of *May*. During that time the pauper was under military control, though he also served the colonel as an in-door serv While the regiment was assem he received pay from the cr and also his wages from his ma

Held, that the pauper gain settlement by hiring and serv the fact of his being a militia having been known to the ma at the time of the hiring. *King* v. *The Inhabitants of Mary at the Walls, Colche H.* 4 *W.* 4. Page 1

SETTLEMENT — *by renting Tenement.*

1. *A.* rented a house in the ap lant parish of *L.* as tenant year to year and died. His wi a fortnight after his death, the landlord that she wishe pay the rent weekly; he assen and she paid it weekly for the lowing nine months when quitted on a week's notice. months after her husband's de the attorney for the respond parish (which had relieved widow) told her she had a ri to take out administration if chose, and if she would leave to him, he would do whatever necessary. She assented, letters of administration were tained, and the pauper resi forty days afterwards in the pellant parish. The sessions fo that the administration was fi dulently taken out by the direct and at the expence of the respo ent parish, for the purpose settling the pauper in the appell parish:

Held, that as the widow was only entitled, but bound by law take out administration, there no fraud in the transaction wh could prevent her from taking administratrix, her husband's terest as yearly tenant, and the by acquiring a settlement. the court referred it back to sessi

sessions as a question of fact, whether the widow after administration granted, continued a weekly tenant, or became a tenant from year to year, in her husband's right. *The King against The Inhabitants of Great Glenn, T.* 3 *W.* 4. Page 188

2. The first section of the statute 1. *W.* 4. *c.* 18. which enacts, "that from and after the passing of that act, no person shall acquire a settlement by reason of the yearly hiring of a dwelling-house, building, &c. unless the rent for the same to the amount of 10*l.* at the least shall be paid by the person hiring the same," is prospective only. *The King* v. *The Inhabitants of Ruthin, T.* 3 *W.* 4. 215

3. To give a settlement by renting a tenement, since the stat. 1 *W.* 4. *c.* 18. there must be an *occupation in fact* of the *whole* dwelling-house or building of which the tenement consists, *by the party hiring the same;* and, therefore, where *A.* took a lease for a year of a house consisting of three floors, at the rent of 40*l.* per annum, and after he had been in possession three months underlet two floors by the quarter, at the rate of 22*l.* per annum, to another person who occupied them for two quarters, the ground floor only during that time being occupied by *A.* and in all other respects the provisions of the 6 *G.* 4. *c.* 57. and 1 *W.* 4 *c.* 18. were complied with, it was Held, that *A.* did not gain a settlement. *The King* v. *The Inhabitants of St. Nicholas, Rochester, T.* 3 *W.* 4. 219

4. A curate licensed by the bishop at a yearly salary according to the 57 *G.* 3. *c.* 99. resided in the rectory house which was assigned to him pursuant to the same statute, and was above the value of 10*l.* a year, for more than forty days before the passing of the 59 *G.* 3. *c.* 50.: Held that this was a *coming to settle* within the statute 13 & 14 *Car.* 2. *c.* 12., and that a settlement was gained thereby. *The King* v. *The Inhabitants of St. Mary, Newington, M.* 4 *W.* 4. Page 540

5. *A.* by lease demised a house and land to *B.* and *C.* for a term of years at 16*l.* per annum. There was a covenant by them jointly and severally to pay taxes and rates, &c., but none to pay rent. *B.* occupied the whole premises, and paid the rent for five years: Held, that, the demise being joint, the rent was payable by the two jointly and that each could only be considered as having rented a tenement at 8*l.* a year, and consequently that *B.* did not gain a settlement, either by renting the tenement, or by being rated and paying rates in respect of it. *The King The* v. *The Inhabitants of Great Wakering. H.* 4 *W.* 4. 971

SETTLEMENT — *by serving an Office.*

In a parish governed by a select vestry, public notice was given that the vestry would meet to elect an organist for a newly erected chapel. At the meeting *C. S.* was elected, and it was entered in the minutes of vestry, that she was appointed organist at 60*l.* per annum. She performed the office for several years, receiving the salary half yearly, and residing in the parish, till, on complaint made against her by the congregation, she was dismissed by order of vestry:

Held, that the office of organist so held by *C. S.*, was not a public annual office, by which a settlement could be gained under 3 *W.* & *M.* *c.* 11. *s.* 6. *The King* v. *The*

The Inhabitants of St. George, Hanover Square, M. 4 *W.* 4. Page 571

SHERIFF'S OFFICER.

See ARREST. 1.

SLANDER.

1. Declaration stated that defendant intending to cause it to be believed that plaintiff *had been guilty of wilfully setting his house and premises on fire*, said of the plaintiff that he had set fire to his own premises, meaning that he had *been guilty of wilfully setting fire* to the premises, which, while in his occupation, had been destroyed by fire. *After verdict* for the plaintiff, the judgment was arrested on the ground that wilfully setting his own premises on fire was not, except under special circumstances, a crime punishable by law; and the Court would presume only such circumstances as it was essentially necessary for the plaintiff to have proved in support of his declaration. *Sweetapple* v. *Jesse, T.* 3 *W.* 4. 27
2. Declaration in slander. The second count stated that the defendant, contriving and intending to injure the plaintiff as a shopwoman and servant, maliciously spoke of her, as such, the following words: "She (meaning the plaintiff) secreted 1s. 6d. under the till; stating, these are not times to be robbed." The declaration alleged as special damage, that one *S.*, by reason of the words, refused to take the plaintiff into his service. After a *general verdict* for the plaintiff, it was held, that the words in the second count, if actionable at all, were so only by reason of the special damage, and therefore that the plaintiff, if entitled to recover, ought to have full costs:

   Held, secondly, on motion in arrest of judgment, that the words in that count were not defam in their nature, and therefor actionable, even though foll by special damage. *Kelly* v. *tington, M.* 4 *W.* 4. Pag

SPECIAL CASE.

See SESSIONS.

SPECIAL DAMAGE.

See SLANDER, 2.

STAMP.

1. In the Stamp Act 55 *G.* 3. c Schedule part 1. (title Bill o change), which imposes a c duty on bills "exceeding months *after date;*" the means the time expressed o face of the bill, not the time it actually issued. And alt by section 12. if a bill purp to be payable at two months a certain time, be issued b the commencement of that p without payment of a propo ate duty, the maker is liabl penalty; yet a bill so post-d and bearing the inferior s corresponding with the purp the bill, is admissible in evid being on the face of it, con able to the schedule. *Wi* v. *Jarrett, T.* 3 *W.* 4.
2. A promissory note payab *A. B.* generally, is not one able *to bearer* on demand, an issuable, within the first cl notes described in 55 *G.* 3. c Sched. part 1., but, a note pa otherwise than to bearer o mand (not re-issuable), v class 2, and therefore such a for 100*l.* requires a stamp of 2 only. *Cheetham and Wife* v. *E M.* 4 *W.* 4.
3. Where an instrument is n

quired by law to be stamped within a particular time after its execution, the Court on its being offered in evidence will not inquire when the stamp was affixed, nor if a penalty was incurred, whether the proper penalty was paid on the stamping. An indenture of apprenticeship, without premium, was executed *April* 27th, 1825, but not stamped till *July*, 1832, when a 1*l.* stamp was put on it, and a 5*l.* penalty paid. Afterwards a double duty (2*l.*) was paid. The indenture was offered in evidence to prove the settlement of a pauper by service under it: Held, that as it was not within the stat. 8 *Anne, c.* 9., which limits the time for stamping indentures, the Court was not called upon to notice the circumstances under which the stamps were affixed. *The King* v. *The Inhabitants of Preston, H.* 4 *W.* 4. Page 1028

4. The 55 *G.* 3. *c.* 184. does not repeal the provision of the 8 *Anne, c.* 9. as to the time for stamping indentures of apprenticeship, and therefore an indenture of apprenticeship (a premium having been paid with the apprentice), must be stamped with the ad valorem duty, within the time prescribed by the stat. 8 *Anne, c.* 9. *s.* 36, 37, 38. and if not so stamped is wholly void. *Rex* v. *The Inhabitants of Church Hulme, E.* 1831. 1029

5. The son of *J. S.* having been arrested, one *W.* becoming his bail, *J. S.* signed an agreement to indemnify *W.* from all liability which he might incur in consequence of having so become bail: Held, that one of the liabilities to which *J. S.* thereby subjected himself, was to pay the debt for which the son of *J. S.* had been arrested, and as that must have amounted to 20*l.*, the subject matter of the agreement must have been of that value, and therefore required a stamp within the 55 *G.* 3. *c.* 184. Sched. part. 1. *Wrigley* v. *Smith, the elder, H.* 4 *W.* 4. Page 1117

STATUTE OF LIMITATIONS.

See PRACTICE, 4.

STEAM ENGINE.

See BANKRUPT, 1.

STET PROCESSUS.

See PARTNERSHIP, 1.

STEWARD, POWER OF, TO ADMIT TENANT.

See COPYHOLD, 3.

STOPPAGE IN TRANSITU.

1. *D.* bought of *Y.* 46 puncheons of rum lying in the warehouse of *Y.* at *Liverpool*, and sold them to *C.* who was a clerk of *Y.*, but carried on business for himself. *D.* gave *C.* an invoice, specifying the marks and numbers of each puncheon, and took his acceptances for the price. The rum and the samples which had been taken remained in *Y.*'s warehouse. The invariable mode of delivering goods sold while they are in warehouses at *Liverpool* is by the vendor's giving a delivery order to the vendee. *D.* was asked by *C.* for delivery orders, but declined giving any, except for two or three puncheons which *C.* received. *C.* marked, coopered and guaged the casks. While the bills were running, *C.* sold twenty-six of the puncheons to *K.* who paid him for them, and who by *C.'s* permission without

without the knowledge of *D.*, guaged and coopered the casks in the warehouse of *Y.* and marked them with his initials. *C.* gave an invoice to *K.* stating the marks and numbers of the casks and by whom the rum was bonded. *C.* also while the bills were running, sold eighteen puncheons of the rum to two other parties, to whom he gave similar invoices and samples, and who afterwards obtained three of the puncheons, on a delivery order signed by themselves, but not by *D.* They paid *C.* for the whole. The bills given by *C.* for the price of the forty-four puncheons were dishonoured: Held upon special case (whereby it was agreed that the Court should be at liberty to draw from the facts any inference that the jury might have drawn) that *C.* never had acquired the actual possession of the rum, and on his dishonouring his acceptances, *D.* had a lien on it for the price; and that *C.*'s subvendees could not claim against *D.* the rum which remained undelivered to them. *Dixon and Another* v. *Yates and others*, *T.* 3 *W.* 4. Page 313

2. *W.* shipped at *Leghorn* twenty-three casks of oil, on account and by the order of *L.* at *Liverpool*, and transmitted to him a bill of lading. Before the arrival of the oil, *L.* indorsed the bill of lading, and deposited it with *H.*, who advanced money on it, having previously advanced money on other goods (the property of *L.*) deposited with him. On the arrival of the oil, *L.* having previously become bankrupt, and *W.* not having been paid for it, *W.*'s agents claimed it of the master of the ship; but the latter delivered it to *H.*, who afterwards sold the goods of *L.* as well as the oil of *W.* The net proceeds of the goods belonging to *L.* were sufficient to satisfy the debt due from *L.* to *H.* *H.* paid himself his debt, and deposited the net proceeds of *W.*'s oil with a third person, to abide the event of the award of an arbitrator to whom all disputes between *W.* and the assignees of *L.* were referred. The arbitrator having stated the above facts on his award for the opinion of this Court: Held that *W.*, the unpaid vendor of the oil, had, at the time when his agents claimed it, no right to take possession on the insolvency of *L.*, because the property in and the right to the possession, was then vested in *H.*, the indorsee of the bill of lading for value; and further, that *W.* had not, by reason of such claim, any legal right to the possession of the goods after *H.*'s lien was satisfied: but that in a court of equity, such transfer to *H.* would be treated as a pledge or mortgage only, and therefore *W.*, by his *attempted* stoppage in transitu, acquired a right to the goods in equity, subject to *H.*'s lien against the assignees of *L.*

Held, secondly, that *W.*, by means of his goods, had become surety to *H.* for *L.*'s debt, and had a clear equity to oblige *H.* to pay his debt out of *L.*'s own goods deposited with him in ease of such surety; and all the goods both of *W.* and *L.* having been sold, *W.* might insist on the proceeds of *L.*'s goods being appropriated to the payment of the debt; and, therefore, that *W.* was entitled to have all the proceeds of the oil paid over to him. *In the matter of Westzinthus and Others*, *M.* 4 *W.* 4. Page 817

SURRENDER.

See COPYHOLD, 3. 5.

TAXATION OF ATTORNEY'S BILL.

See ATTORNEY, 1, 2.

TOLL.

TOLL.

Where certain roads were, by local acts, placed under the direction of trustees for amending, improving, and repairing the same, and the trustees were empowered to erect turnpike gates on the said roads, and receive tolls there; but there was a certain portion of one of the said roads, which they were prohibited from repairing or improving, and on which they were not to erect toll-gates:

Held, that a person travelling along the last-mentioned road for more than a hundred yards including the excepted part, but less if that part were excluded, was not exempted from toll by 3 *G.* 4. *c.* 126. *s.* 32. *Pope* v. *Langworthy*, *T.* 3 *W.* 4. Page 464

TRESPASS.

See PLEADING, 3, 4.

TROVER.

See LIEN.

TRUSTEES.

See CANAL ACT, 2. HIGHWAY, 1. INSURANCE BROKER.

TURNPIKE ACT.

See HIGHWAY, 2. MANDAMUS, 2. TOLL.

A local turnpike act directed that the trustees should keep books, in which they should enter their accounts, and also their orders and proceedings; and that *all persons* should have access to such entries. By a subsequent local act it was directed, that the trustees should keep a book, in which they should enter their accounts, which book should be open to the inspection of the *trustees*, or of *any creditor on the tolls*. The general turnpike act, 3 *G.* 4. *c.* 126. *s.* 73., re-enacted the latter provision as to all turnpike road accounts, and *s.* 72. directed that all trustees of turnpike roads should keep a book of their orders and proceedings, which should be open to the inspection of *any of the trustees*, and should be read as evidence in courts as there directed. That act also provides, that the enactments therein contained shall extend to all other turnpike acts, except where, by that act, it is otherwise ordered:

Held, that these clauses of the general and of the second local act, superseded the provisions of the original act, and limited the power of inspection at first given to the whole public, confining it to trustees, and to trustees and creditors in the respective cases of orders and accounts. *The King* v. *The Trustees of the North Leach and Witney Roads*, *H.* 4 *W.* 4. Page 978

UMPIRE.

See ARBITRAMENT, 2.

UNIFORMITY OF PROCESS ACT.

See PLEADING, 8. PRACTICE, 2. 6.

VALUED POLICY.

See INSURANCE, 1.

VARIANCE.

See BILL OF EXCHANGE, 1. PLEADING, 6, 7.

VENDOR AND VENDEE.

See ACTION ON THE CASE, 2. FRAUDS, STATUTE OF. PLEADING. 5. STOPPAGE IN TRANSITU, 1, 2.

1. By the 36 *G.* 3. *c.* 88., entitled "An Act to prevent Abuses and Frauds in the Packing, Weight, and Sale of butter," (*s.* 2.) every cooper, or other person making a vessel for packing butter, is required to brand his Christian and surname on such vessel, together with the exact weight or tare thereof, or in default thereof he is to forfeit for every such vessel not so marked 10*s*. By section 3. every dairyman, farmer, &c., who shall pack any butter for sale shall pack the same in vessels so made and marked as aforesaid, and shall brand his Christian and surname on different parts of the vessel therein described and on the butter contained in such vessel, upon penalty of forfeiting for every default 5*l*.

In an action brought by a farmer to recover the price of fifteen firkins of butter sold by him to the defendant, it appeared that the firkins were not marked according to the act:

Held that the provisions which required the vessel to be branded with the name of the cooper, seller, &c., being intended for the protection of the public against fraud, indirectly prohibited any sale of butter in vessels not properly marked; that the subject matter of this contract was in such a state from the vessels not being properly marked, that the sale of it was forbidden by act of parliament; and consequently that the contract of sale was void, and the plaintiff could not recover:

Held further, that although there was a penalty imposed in the same clause of the act [illegible] directed the thing to be [illegible] the remedy of the public [illegible] a person infringing the [illegible] not thereby [illegible] ing for the penalty, but [illegible] clause might be [illegible] as a defence to an action. [illegible] v. *Taylor*, *M.* & *W.* 5. [illegible]

2. In every contract for the [illegible] an existing lease, there is an [illegible] plied undertaking by the [illegible] the contrary be not [illegible] to make out the lessor's [illegible] to demise, and without such [illegible] such title, the seller cannot [illegible] tain an action at law against [illegible] buyer, for refusing to [illegible] the purchase.

Where a lessee in possession contracted to sell the remainder of his term, being three years [illegible] quarter, at the rent of [illegible] num the vendee paying [illegible] fixtures as per list: there [illegible] was not to be [illegible] short residue of the term, small value of the property, the absence of any [illegible] for the lease, that the vendee [illegible] tended to waive his right [illegible] for the production of the [illegible] title. *Souter* v. *Drake*, [illegible]

VENUE.

See INDICTMENT, 1. PLEADING [illegible]

VOLUNTARY PAYMENT

See BANKRUPT, [illegible]

WAGES, ACTION FOR

See MASTER AND SERVANT.

WAIVER.

See LEASE, 5.

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